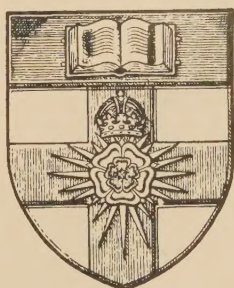


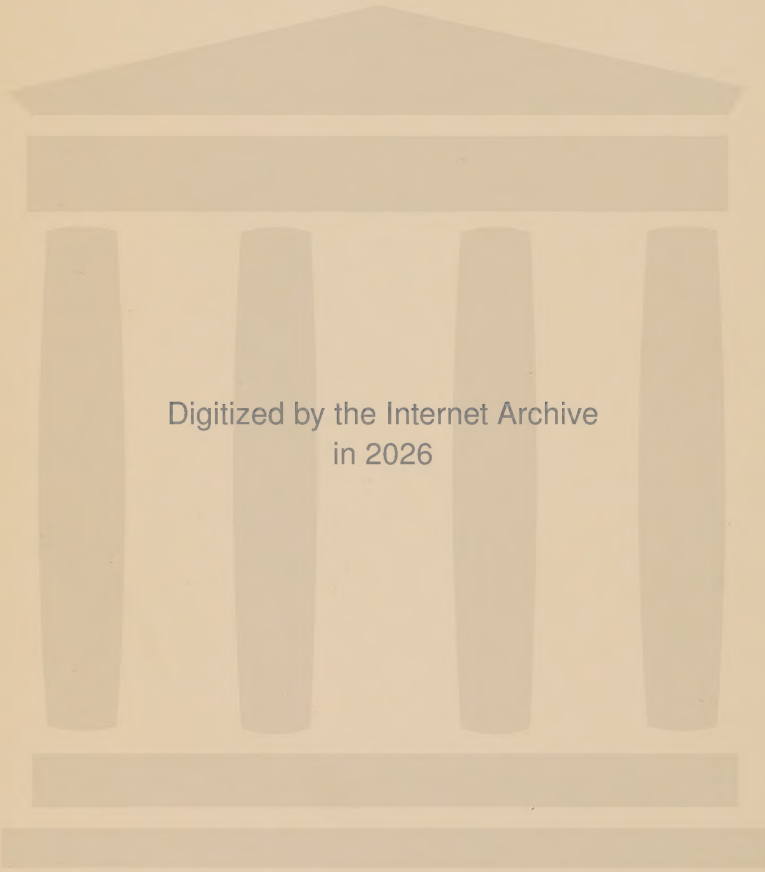
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CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

MICHAELMAS TERM, XXXVI VICTORIA.

THARSIS SULPHUR AND COPPER COMPANY, LIMITED v. LOFTUS.

*Arbitrator—Average Adjuster—Want of Care in Performance of Duties—
Action for Negligence not maintainable.*

General average losses having been incurred in the prosecution of a voyage, it became necessary to settle and adjust the proportion of the loss which the ship and cargo had respectively to bear, and in order to do so, the plaintiffs, the owners of cargo, and the shipowner agreed to refer the matter to the defendant, an average adjuster, and to be bound by his decision:—

Held, that an action would not lie against the defendant at the suit of the plaintiffs for want of care in the performance of his duties as average adjuster, inasmuch as he was in the nature of an arbitrator between the parties.

DECLARATION for that before and at the time of the retainer and employment of the defendant, and of his committing the grievances hereinafter mentioned, the defendant carried on and exercised the business of an average adjuster, and that before the said retainer and employment, and before the committing of the said grievances, a vessel called the *Emma*, having on board a large cargo of copper ore, of which the plaintiffs were the consignees and owners, and whilst on her voyage from Huelva to Liverpool, met with tempestuous weather, and sustained injuries, and her

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said cargo became damaged, and she was thereby compelled to put into a port of distress for repairs, and other necessary purposes, and incurred certain general average and other losses, charges, and disbursements, which said losses, charges, and disbursements, upon the arrival of the said vessel at Liverpool aforesaid, it became and was necessary to adjust and apportion in manner by usage and custom used and approved, and therefore the master of the said vessel, on her arrival at Liverpool aforesaid, as well for and on behalf of the owners of the vessel as for and on behalf of the plaintiffs, as such consignees and owners of the said cargo, as aforesaid, at the request of the defendant, and for reward to him in that behalf, retained and employed the defendant as such average adjuster, as aforesaid, to investigate and examine the vouchers and accounts of the said losses, charges, and disbursements, and to settle, adjust, make up, and prepare a statement shewing the proportion of the said losses, charges, and disbursements to be contributed and borne by the said ship, her freight and cargo respectively, according to the usage and custom of Lloyd's; and the defendant then accepted and entered upon such retainer and employment, and thereupon it became and was the duty of the defendant as such average adjuster, as aforesaid, under the said retainer and employment, to take due and proper care, and to use and employ proper skill and diligence in and about the investigation and examination of the vouchers and accounts of the said losses, charges, and disbursements, and in and about settling, adjusting, making, and preparing a statement shewing the proportions of the said losses, charges, and disbursements to be contributed and borne by the said ship, freight, and cargo respectively, according to the said usage and custom. Yet the defendant, not regarding his duty in that behalf, would not take due and proper care, and would not use and employ due and proper skill and diligence in and about the investigation and examination of the said vouchers and accounts, and in and about settling, adjusting, making, and preparing the said statement, and conducted himself so carelessly, negligently, and unskilfully in that behalf, that by and through the carelessness, negligence, and unskilfulness of the defendant in that behalf, the said statement so settled, adjusted, made up, and prepared by him, was incorrect, erroneous, and imperfect in this, that the proportion of the said

losses, charges, and disbursements to be contributed and borne by the said cargo of the plaintiffs, was stated, settled, and adjusted at a much larger amount than the same ought to have been stated, adjusted, and settled at, according to the said usage and custom; and in this, that certain special charges were stated, adjusted, and settled as payable by the said cargo of the plaintiffs, which were not so payable according to the said usage and custom, whereby and by reason of the premises, the plaintiffs, confiding in the defendant's performance of his said duty, and not knowing of the breach of the same, as aforesaid, and believing that the said statement so settled, adjusted, made up, and prepared, was accurate, and correct, and properly made up, adjusted, and prepared according to the said usage and custom, and that the proportion of the said losses, charges, and disbursements in and by the said statement, stated, adjusted, and fixed as payable by the said cargo of the plaintiffs, was the correct and proper portion payable by the said cargo, and that the said other charges were properly payable by the said plaintiffs' cargo, according to the said usage and custom, paid to the owners of the said vessel, the said incorrect and excessive proportion of the said losses, charges, and disbursements so stated, adjusted, and settled by the defendant in the said statement, and the said special charges; and by reason of the premises, the plaintiffs have lost and been deprived of the moneys so paid by them, over and above what they otherwise would have paid.

4th plea: That before the making of the said statement by the defendant an agreement in writing was made between Edward James Brown, the master of the said vessel, of the one part, and a certain firm under the style of Messrs. Tennants & Company, as and being the agents of the plaintiffs in that behalf of the other part, which said agreement was in the words and figures following, namely: "This agreement, made the 28th day of April, 1871, between Edward James Brown, master and owner of the English schooner or vessel the *Emma*, of the first part, and Messrs. Tennants & Company (which includes all members of that firm), of 20, Red-cross Street, Liverpool, in the county of Lancaster, merchants, being the owners or consignees of cargo by the said vessel, of the second part. Whereas the said vessel, the *Emma*, laden with a cargo of copper ore sailed from Huelva, on the 19th day of December,

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1870, on a voyage for Liverpool, and on such voyage she encountered a series of heavy storms and seas, and was obliged to put back to Cadiz, and thereby and in consequence thereof considerable damage or loss has been occasioned or sustained to the cargo, and various expenses and disbursements have been incurred, and it will be necessary to have a general average or contribution in respect thereof, to which the said parties hereto of the second part are liable to contribute. Now these presents witness that in consideration of the engagements and agreements of the said parties hereto of the second part, the said Edward James Brown doth hereby engage and agree with the said parties hereto of the second part, that he the said Edward James Brown will deliver, or cause to be delivered, at a reasonable request and time, the said cargo laden on board the said vessel unto the said parties hereto of the second part, their factors, agents, and assigns, and permit them to receive, and take possession, and remove the same, according to their rights, possession, and ownership in respect thereof, on their paying freight and other charges, and performing conditions as per bill of lading, charterparty, or agreement, in consideration whereof the said parties hereto of the second part do hereby for themselves jointly engage and agree with the said Edward James Brown to pay to the said Edward James Brown, or his agents, not only the freight and charges of the said goods, but also the proper proportion of the general average loss, general contribution, charges, and expenses in respect of the said cargo, and all legal charges and other contribution, loss, and expenses to which they are or shall be liable, or for or on assurances of what in the judgment of the parties hereinafter named contribution ought to be made by the said parties hereto of the second part, or what the cargo ought to bear under the aforesaid circumstances, and for the better computing as well the question of contribution as the amount which the said parties hereto of the second part will have to pay in respect thereof; and that the same may be more readily ascertained the said parties hereto of the second part do hereby further agree that the same shall be ascertained by Mr. Henry Loftus, of Liverpool, average adjuster (meaning the defendant), whose decision they the said parties of the second part do hereby agree to abide by and perform, the average to be adjusted in accordance with the usage and

custom of Lloyd's. As witness, &c., Tennants & Co., agents for the Tharsis Sulphur and Copper Co. Witness to the signing, Thomas Barrett, 20, Redcross Street, Liverpool." And the defendant says that his retainer and employment to investigate and examine the said vouchers and to settle, adjust, make up and prepare the said statement in the declaration mentioned was under by and by virtue of the said agreement, and not otherwise, and the defendant acting in good faith and under such retainer and employment as last aforesaid took upon himself the burthen of the said inquiry, and investigated and examined the said vouchers, and made the said erroneous statement.

Demurrer and joinder in demurrer.

Myburgh, for the plaintiffs. The present case is distinguishable from *Pappa v. Rose* (1). The defendant here is not a quasi arbitrator, as the defendant in that case was. In order that there may be a quasi arbitrator, it is necessary that disputes should have arisen between the parties. It does not appear on this plea that any disputes had arisen as to the amount of average contribution, but merely that the defendant was employed to calculate the amount.

[BOVILL, C.J. The nature of the agreement set out assumes that the amount was in question between the parties.]

Secondly, it is an average adjuster's business to settle these questions, and he must therefore be taken to hold himself out as prepared to bring to that business a reasonable amount of care and skill. It is not a broker's business to decide as to the quality of goods between parties.

[BOVILL, C.J. This declaration alleges negligence and want of care on the defendant's part. In *Pappa v. Rose* (1) the facts did not really raise the question of want of care; the only question raised was as to want of skill, though this does not clearly appear from the reports.]

It may well be that want of skill and want of care stand on a different footing. Having selected your arbitrator, you take him for better or worse as far as skill is concerned, but he may still be bound to use reasonable care.

(1) Law Rep. 7 C. P. 32, 525.

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He also cited Russell on Arbitration, 3rd ed. p. 42; *Leeds v. Burrows* (1); *Collins v. Collins* (2); *Bos v. Helsham*. (3)

Gully, for the defendant. The decision in *Pappa v. Rose* (4) governs the present case. It is clear that an arbitrator would not be liable for that which is alleged in this declaration; there is no authority or precedent for an action of negligence against an arbitrator; and it is contended that the defendant is in the same position. All the reasons given for the decision in *Pappa v. Rose* (4) apply equally to the present case. The principle is, that where parties have submitted a question to a third person's decision, and have agreed to be bound by such decision, they take it for better or worse. In cases which amount to misconduct on the part of an arbitrator, there may be a remedy by setting aside the award; but it is contended, that even in such cases no action will lie. The fact that the defendant's business was that of an average adjuster can make no difference in the application of the principle.

[He also cited Russell on Arbitration, p. 461; *Re Hall v. Hinds*. (5)]

BOVILL, C.J. On the question that was chiefly argued before us, viz., whether a person employed, as the defendant was, as an average adjuster, is liable to an action for want of skill, I am clearly of opinion that the case is undistinguishable from that of *Pappa v. Rose*. (4) But that case did not raise the question, whether a person so employed is responsible for want of care or negligence. That question might have been raised on the pleadings in *Pappa v. Rose* (4); but it did not arise on the direction at the trial or on the arguments in this court or the court of error. This is quite clear on reference to the statement of the facts in the case on appeal, though it does not appear from the reports of the case. During the argument of the case in the Exchequer Chamber various observations were made by the judges with reference to the question whether an action would lie against a person in the position of the defendant for misconduct, but no opinion was expressed. No authority has been cited to shew that a person called upon to act as an arbitrator, or to settle disputes or adjust

(1) 12 East, at p. 6, n.

(2) 26 Beav. 30.; 23 L. J. (Ch.)

(3) Law Rep. 2 Ex. 72.

(4) Law Rep. 7 C. P. 32, 525.

(5) 2 M. & G. 847.

accounts between parties is liable to an action for negligence. In Baron Watson's book on Arbitrators, 3rd ed. p. 112, the following passage occurs: "It has been said that an arbitrator is liable to an action if he misconduct himself, but I cannot find any case in which such an action has been brought." The author had a large experience, both as a pleader and at the bar, and he states that he never met with any case in which such an action had been brought; and, so far as my own experience goes, such an action would be quite unprecedented. This argument might not have much weight when the circumstances are novel; but this case must occur constantly. It must constantly happen that parties are dissatisfied with the decision of an arbitrator or quasi arbitrator, and yet we find, notwithstanding the facility with which speculative actions for negligence are brought upon the slenderest grounds, that there is no precedent for such an action for negligence as this. It appears to me that the principle upon which *Pappa v. Rose* (1) was decided applies to this case; and, looking to the inconveniences that would arise if an arbitrator were liable to an action for negligence, I am not disposed to lay it down for the first time that such an action is maintainable. I therefore think our judgment should be for the defendant.

KEATING, J. I am of the same opinion. I think that it would be a very dangerous principle to establish that a person in the position of the defendant may be liable to an action for negligence in the discharge of his functions. It seems to me difficult to discriminate for this purpose between skill and diligence. The Court of error has decided that a person in the defendant's position is not bound to bring any particular amount of skill to the performance of his duties. One of the most frequent grounds upon which actions of negligence are brought is not exhibiting due skill in the performance of a duty. Now, without deciding what is the proper definition of an arbitrator, it appears to me clear that the defendant is in the position of an arbitrator for the present purpose, inasmuch as he was a person by whose decision two parties having a difference agreed to be bound. It appears to me that the safe rule when parties agree to be bound by the decision of a third

(1) Law Rep. 7 C. P. 32, 525.

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party on any matter is, that they take him in such a case for better or worse; and if he discharges his duty faithfully and honestly they must be satisfied.

For this reason I think the plea is good.

BRETT, J. The effect of the pleadings, taken together, appears to me to be, that there was an agreement by the parties to accept the decision of the defendant on a particular matter, if the defendant would undertake to decide it, and that the defendant did undertake to do so. The declaration alleges a duty on the defendant's part, arising from his so undertaking, to take due care, and to use proper skill and diligence. The question is, whether there is any such duty as alleged imposed upon the defendant in the sense that for non-fulfilment of such duty he would be liable to an action. It is said that there was such a duty imposed upon him, first, as being an arbitrator; secondly, as not being an arbitrator; and, thirdly, because whether in the position of an arbitrator or not, his ordinary business and employment being that of an average adjuster, he must be taken to hold himself out as prepared to bring due skill and care to the performance of his duties in the course of such business and employment. With respect to the first ground taken, it is admitted that as an arbitrator he would not be liable for want of skill, but it is suggested that he would be for want of care. It appears to me that there are the strongest grounds for deciding otherwise. There must have been thousands of such cases in which an allegation of want of care or diligence might have been made, and yet there is no case in the books in which such an action has been brought. Then it is said that the defendant is liable because he was not an arbitrator, but only a person who had undertaken to adjust accounts between two parties. Now the case of *Pappa v. Rose* (1) decides that a person who undertakes to give a decision between two parties as to any matter, though he may not be an arbitrator in the strict sense of the word, as not being bound to exercise all the judicial functions for the purpose of deciding the matter in dispute that an arbitrator in the strict sense of the term would have to exercise, nevertheless, is not liable to an action for want of skill. It appears to me that the reasoning

(1) Law Rep. 7 C, P. 32, 525.

employed in that case is equally applicable to an action for want of care, and that if an arbitrator in the strict sense of the word is not liable for want of care, it follows that a person who has undertaken to decide a dispute between two parties is also not liable.

Then it was contended that, even though the defendant might be an arbitrator or a quasi arbitrator, he is liable, because he holds himself out as a professional average adjuster, and so undertakes to bring due skill and care to the performance of his functions. I apprehend that the principle of law which forbids an action for want of skill or care against an arbitrator or a quasi arbitrator, is just as applicable to a skilled or professional arbitrator as to one that is unskilled and non-professional, and that the fact of its being his business makes no difference. For these reasons I am of opinion that the plea is good.

DENMAN, J. The case of *Pappa v. Rose* (1) is not expressly in point, merely because the only question which, upon the facts of the case, absolutely called for decision was, whether an action would lie for want of skill. In this case the principle must be carried a little further, for here the question is whether an action will lie for want of care or negligence on the part of a person in the position of the defendant. I think that although the case of *Pappa v. Rose* (1) does not expressly decide this case, it is, in point of principle, conclusive of it. I adopt the reasoning of Martin, B., in the Exchequer Chamber, and it appears to me that the parties take the person by whose decision they have agreed to be bound for better or worse. Mellor, J., in giving judgment, lays down the same principle: "The contracting parties agree to be bound by the opinion of Mr. Rose, such as it is, he exercising his judgment honestly." So here the parties agreed to be bound by the opinion of the defendant, if he acted honestly, and the plea expressly states that he did so act. For these reasons I think our judgment should be for the defendant.

Judgment for the defendant.

Attorneys for plaintiffs: *Field & Roscoe, for Bateson, Robinson, & Morris.*

Attorney for defendant: *W. W. Wynne, for Simpson & North.*

(1) Law Rep. 7 C. P. 32, 525.

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Equitable Set-off—Unliquidated Damages—Cross Claims arising out of the same Contract.

To a declaration for money lent and paid and commission the defendant pleaded for a defence on equitable grounds, that it was agreed between the plaintiffs and himself, on the following terms, viz., that he should consign certain rice to the plaintiffs' firm at Buenos Ayres and Monte Video, for sale by the plaintiffs for him upon commission; that the plaintiffs should make certain advances against the rice and pay the expenses of the consignment; and that the plaintiffs should sell the rice, and satisfy out of the proceeds the said advances, expenses, and commission, and pay to the defendant the balance remaining out of such proceeds. The plea further stated that the rice was duly consigned to the plaintiffs under the agreement; that the claims in the declaration were the advances, expenses, and commission contemplated by the agreement; and that the plaintiffs were guilty of such negligence and improper conduct in the care of the rice and the management of the sale of it, that it fetched much less than it ought to have done, and insufficient to satisfy the advances, expenses, and commission, whereas it would, but for their negligence and misconduct, have realized sufficient, and much more than sufficient, to have fully paid and satisfied the same, and the deficiency arising upon the sale, which was the claim for which the action was brought, had therefore entirely arisen from the plaintiffs' negligence, default, and misconduct:—

Held, a bad plea.

DECLARATION for money lent, money paid, commission for and in respect of plaintiffs having provided the money for paying and paid divers bills of exchange, for interest and money due on accounts stated.

4th plea, as a defence on equitable grounds, that before and at the time of the agreement hereinafter mentioned, the defendant was, and carried on the business of, a rice merchant at Liverpool, under the name and style and firm of Hill & Smith; and that the plaintiffs were then also commission agents and factors, and as such carried on business at Liverpool, under the name and style and firm of Rodgers, Best, & Co., also at Monte Video, under the name and style and firm of Rodgers & Brothers, and also at Buenos Ayres, under the name and style and firm of John Best & Brothers; and thereupon it was mutually agreed by and between the plaintiffs and the defendant for commission and reward to be received by the plaintiffs on that behalf, that the defendant

should consign rice in certain ships at Liverpool to the plaintiffs' said firms at Buenos Ayres and Monte Video aforesaid, for sale by the plaintiffs for the defendant at Buenos Ayres and Monte Video aforesaid; and that the plaintiffs should accept certain bills of exchange drawn by the defendant on the plaintiffs against the said rice, and in anticipation of the receipt by the plaintiffs of the proceeds of the sales thereof; and that the said bills should be met and paid by the plaintiffs; and that the plaintiffs should make certain advances against the said rice so consigned, and should pay the charges and expenses in consequence of such consignment, acceptances, and sales; and that the defendant should assign and transfer to the plaintiffs the bills of lading in respect of the said rice; and that the plaintiffs should sell the said rice at Buenos Ayres and Monte Video aforesaid, and pay and satisfy out of the proceeds of the said sales such acceptances and several payments by the plaintiffs in respect thereof, also the said advances charges and expenses and interest thereon, as well as the said reward and commission; and that the plaintiffs should pay to the defendant the balance of the said proceeds, after deducting such acceptances, payments, advances, charges, expenses, reward, and commission as aforesaid. And the defendant further says that he accordingly consigned rice to plaintiffs for sale upon the terms aforesaid; and the plaintiffs accepted bills of exchange drawn by the defendant against the said rice as agreed: and that the defendant duly assigned and transferred to the plaintiffs the bills of lading in respect of the said rice, and employed the plaintiffs to sell the said rice, and to apply and pay the proceeds thereof upon the terms and in the manner aforesaid and not otherwise. And the defendant further says that the plaintiffs took possession of and held the said rice under and by virtue of the said bills of lading and upon the terms aforesaid, and not otherwise. And the defendant further says that the moneys so mentioned to have been lent and paid as in the declaration mentioned were and are the said advances and payments so made as in this plea mentioned; and that the said bills of exchange in the declaration mentioned were and are the said bills of exchange in this plea mentioned; and that the said interest in the declaration mentioned was and is the interest in respect of the said payments and advances so made by

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the plaintiffs as aforesaid; and that the commission in the declaration mentioned was and is the commission in respect of the said sales and consignments and acceptances in this plea mentioned; and that the accounts so mentioned in the declaration to have been stated were stated of and concerning the said advances, payments, commission, reward, and interest as aforesaid and not otherwise. And the defendant further says that the plaintiffs took such negligent, bad, and improper care of a part of the said rice whilst the same was in their possession as aforesaid, that the same when sold by the plaintiffs, as hereinafter mentioned, became and was in bad condition and deteriorated in value, and the same by reason thereof was sold by the plaintiffs at much lower and inferior prices than it might and would and ought to have been sold, and the plaintiffs also negligently and improperly sold the said rice at prices much below the market prices of such several goods when sold, and at which market prices the said rice might, could, and ought to have been sold by the plaintiffs, and the plaintiffs before this suit received the proceeds thereof. And the defendant further says that the said rice before this suit could and might and ought to have been sold and realized by the sales thereof, and but for such bad and improper care and negligent and improper sales and misconduct would have realized sufficient, and much more than sufficient, to have fully paid and satisfied the said loans, payments, reward, commission, charges, interest, acceptances, and the whole of the claims of the plaintiffs in respect thereof and now sued for, if the same had been taken due and proper care of by the plaintiffs, as aforesaid, and sold with due and proper care, and that by and through the mere negligence and wilful default and improper conduct of the plaintiffs aforesaid the said rice and the proceeds thereof became, and were before this suit, and are insufficient to discharge the said acceptances, payments, loans, charges, reward, commission, interest, and moneys now sued for, and the said deficiency which is the claim for which this action is brought, and no other or different claim, has entirely arisen from the plaintiffs' said negligence, default, and misconduct.

Demurrer and joinder in demurrer.

Cohen, for the plaintiffs. This is an attempt to set off unli-

quidated damages, which cannot be done in equity in such a case as this, any more than at law. The case of *Rawson v. Samuel* (1) is a conclusive authority on the point. It was there held that the mere existence of cross demands, arising out of the same contract, is not sufficient to support an equitable set-off. See also Story's *Equitable Jurisprudence*, ss. 1434-1436. In the present case there are all the circumstances which were held to be fatal to the set-off in *Rawson v. Samuel*. (1) There are unsettled accounts between the parties, and the one claim arises out of the fulfilment of the contract, and the other out of the breach; a case in which it was expressly laid down by the Lord Chancellor Cottenham that the claims were not connected with one another in such a sense as that an equity to a set-off existed. It is quite clear that in such a case a Court of Chancery would not grant a perpetual unconditional injunction. Then it may be contended that the plea, though bad as a plea of equitable set-off, is good as amounting to an argumentative general issue, or as shewing that the debt arose from the plaintiffs' own default. The Court will not interpret an equitable plea like this, when bad as such, as amounting to the general issue unless it very clearly does so. On the most favourable construction of these pleadings for the defendant a debt exists; for if the agreement be construed as meaning that no debt should arise till a sale of the rice, it is clear a debt arises in respect of the deficiency upon a sale, however caused. For a defence against such debt the defendant must go de hors the agreement, and rely on an equity independent of it, which it has been shewn does not exist.

Butt, Q.C. (*Baylis* with him), for the defendant. It must be taken on demurrer that the allegation in the plea that the damages would exceed the amount of the plaintiff's claim is true. This makes the case somewhat different from *Rawson v. Samuel* (1), for there one of the grounds expressly alleged for rejecting the right of set-off was that there was a lengthy and complicated outstanding account, and it could not be known which way the balance would turn out to be. *Beasley v. D'Arcy* (2) is an authority in defendant's favour. In *Stimson v. Hall* (3) Bramwell, B., says: "In *Beasley v. D'Arcy* there was a clear equity; the tenant owed his landlord

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(1) 1 Cr. & P. 161.

(2) 2 Sch. & Lef. 403, n.

(3) 1 H. & N. 831; 26 L. J. (Ex.) 212.

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rent, and the latter had committed a trespass on the land which rendered it of less value and prevented the tenant, to a certain extent, from getting the rent out of it. The Court, in effect, say, you shall not take advantage of the forfeiture, because you have rendered the land of less value by your wrongful act." So here the plaintiffs, by their wrongful conduct of the sale, themselves caused the debt; and here there is the element that was wanting in *Stimson v. Hall* (1), that the cross claims arise out of the same transaction.

[BOVILL, C.J. The Lord Chancellor said, in *Rawson v. Samuel* (2), that where the proceedings are one for an account of the transactions under a contract, and the other for damages for breach of the same contract, the fact that the agreement was the origin of both does not form a sufficient bond of union.]

In the case of the *Mutual Loan Fund Association v. Sudlow* (3) it was held that a surety might, to an action for the debt, set up as an equitable defence a loss occasioned by the creditor's negligence in realizing a security.

Secondly, the plea is good as amounting to the general issue. The meaning of the agreement is that the plaintiffs shall pay themselves out of the proceeds if they can; and if they can there is to be no debt. The only debt that could arise under this agreement would be for a deficiency upon the sale, if not occasioned by any default of the plaintiffs. Here the deficiency was caused by their own fault, and so gives rise to no debt.

Cohen, in reply.

BOVILL, C.J. The facts stated in the plea clearly shew that no defence can be raised by way of legal set-off, inasmuch as the claim of the defendant is in respect of unliquidated damages. With regard to the question whether the plea can be supported as an equitable plea, it appears to me to be equally clear that it cannot, on the ground that the claim is for unliquidated damages, the amount of which has not been ascertained. If this claim were set up as the ground of a bill in equity to restrain proceedings at law, it would not be possible for a Court of equity to grant an absolute

(1) 1 H. & N. 831; 26 L. J. (Ex.) 212.

(2) 1 Cr. & P. 161

(3) 5 C. B. (N.S.) 449; 28 L. J. (C.P.) 108. *5 Jan. 1883*

unconditional and perpetual injunction; but terms must be imposed. The parties would probably be compelled to proceed to the trial of an action at law to ascertain the amount of the claim, and when such amount was ascertained execution might be stayed. Mr. Butt was pressed with this difficulty, but could give no sufficient answer to it. Another difficulty would be that the proceeding to ascertain the amount of the damages at law would involve considerable delay, and terms would have to be imposed for the purpose of preventing injury to the party delayed, and giving him compensation by way of interest for the delay if successful. There would probably be also some term imposed with reference to payment of money into court. All these considerations shew that this claim is not available by way of equitable set-off. There is also this further consideration: although these cross claims in one sense are connected, inasmuch as they arise out of the same contract, that does not appear to be sufficient, according to the doctrine of equity in relation to set-off; one claim arises out of the performance of the contract, the other out of its breach. This case seems to me, in principle, undistinguishable from *Rawson v. Samuel*. (1) There the claim on one side was originally for unliquidated damages, but the difficulty did not arise from this fact, for the injunction prayed for was only against execution. The way in which the difficulty as to the non-liquidation of amount arose was that a long account would have been necessary to ascertain which way the balance between the parties was. The bill was amended, and it was alleged that the claim would be larger than the damages; but Lord Cottenham said, "It is admitted that there is a complicated account to be taken between the plaintiffs and the defendant, upon the result of which, however, the defendant says he believes that a balance will be found due to him . . . The question is whether the defendant in equity, having obtained a verdict as compensation for such breach of contract and consequential injury, ought to be restrained from receiving the sum awarded to him until the complicated account stated in the bill shall have been taken and the balance ascertained. This would produce the most obvious injustice if the balance should be found in favour of the plaintiff at law, which he has sworn he believes it will. And whatever weight may

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be attached to this statement of belief as to the probable balance of a long and complicated account, the case is certainly not one in which the plaintiffs in equity can ask the Court to assume that the balance will be in their favour."

Then again with respect to the question whether the matters were sufficiently connected, he says: "It was said that the subject of the suit in this court, and of the action at law, arise out of the same contract; but the one is for an account of transactions under the contract, and the other for damages for the breach of it. The object and subject-matters are therefore totally distinct; and the fact that the agreement was the origin of both does not form any bond of union for the purpose of supporting an injunction."

It appears to me impossible to distinguish this case from *Rawson v. Samuel* (1) in principle, and therefore that the plea cannot be supported as an equitable plea; but then it was urged that the plea is equivalent to a plea of never indebted. This can only be the case if, upon the construction of the agreement set out, it appears that no debt ever arose. It appears to me quite clear, upon the declaration and plea taken together, that there was a debt arising, if not before, at any rate upon the deficiency arising out of the sale under the agreement. I am quite at a loss to see how it can be said that under the agreement it was contemplated that the amounts due should be satisfied out of the damages for breach of the contract. For these reasons I am of opinion that the plea is bad.

KEATING, J. I am of the same opinion. It is quite clear that unliquidated damages cannot be set off at law. No authority has been cited to shew that a Court of equity could deal with this claim as an equitable set-off, until the amount had been ascertained. As my Lord has pointed out, the case of *Rawson v. Samuel* (1) clearly shews this to be the case. In the case of *Beasley v. D'Arcy* (2), which was cited on argument, it is evident that the unliquidated demand had become liquidated by the verdict of the jury. I am, therefore, clearly of opinion that, as an equitable plea, this plea cannot be supported. With respect to the question whether it amounts to the general issue, I quite agree with my Lord.

(1) 1 Cr. & P. 161.

(3) 2 Sch. & Lef. 403, n.

BRETT, J. This plea would clearly be bad as a plea of set-off at common law. I am also of opinion that it is bad as a plea of equitable set-off, first, on the ground that the cross claims are not connected in the sense in which they must be connected for the purpose of an equitable set-off, according to the doctrines of the Court of Chancery; secondly, on the ground that the claim is for unliquidated damages; and, thirdly, on the ground that this is not a case in which equity would grant an unconditional injunction. *Rawson v. Samuel* (1), and *Beasley v. D'Arcy* (2) appear to me to be authorities for so deciding. With regard to the question whether the plea can be supported, as amounting to the general issue, taking the most favourable view of the case for the defendant, it amounts to this: viz. that the defendant agreed, if there was a deficiency upon a sale of the goods, to pay the amount of such deficiency, or to be indebted to such amount. There was a deficiency upon the sale, and consequently a debt arose.

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DENMAN, J., concurred.

Attorneys for plaintiff: *Field & Roscoe*.

Attorneys for defendant: *Gregory & Rowcliffes, for Hull, Stone, & Fletcher*.

(1) 1 Cr. & P. 161.

(2) 2 Sch. & Lef. 403, n.

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Nov. 21.

STEPHENS v. THE AUSTRALASIAN INSURANCE COMPANY.

*Ship and Shipping—Marine Insurance—Deck Cargo—Open Policy—
Declaration of Ships—Insurable Interest.*

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C. & Co., shipowners, were in the habit of receiving shipments of cotton to be carried on deck, sometimes at the shipper's request and at his risk, in which case the bill of lading expressed it to be so shipped, and sometimes for their own convenience, in which case it was at their own risk, and a clean bill of lading was given. To protect themselves against probable loss by jettison in the case of cotton shipped as last mentioned, C. & Co., through the plaintiff, their insurance broker, had effected with the defendants, on the 29th of March, 1864, an open policy to a certain specified amount, to be subsequently declared on. A parcel of cotton consisting of 102 bales was shipped on the 20th of December, 1864, at Alexandria, on board a ship belonging to C. & Co. This cotton was intended to be shipped on deck at shipper's risk, but by mistake C. & Co.'s agent gave a clean bill of lading in respect of it. Being supposed to be at shipper's risk, it was not declared under the policy, but other shipments of cotton on various vessels, some of them subsequent in date to the shipment of the 20th of December, were declared to the full amount of the policy. The 102 bales were lost by jettison, and the holders of the bill of lading claimed payment of the value of the cotton. The plaintiff thereupon altered the declarations on the policy by declaring the 102 bales, in substitution for a portion of the cotton subsequently shipped. According to the usage of the insurance business, as found in a special case stated between the plaintiff and defendants in an action to recover the value of the 102 bales on the policy of the 29th of March, in the case of policies on ships to be declared the policy attaches to the goods as soon as and in the order in which they are shipped, in which order the assured is bound to declare them. In case of mistake as to the order of shipment he is bound to rectify the declarations, which is sometimes done even after loss :—

Held, that C. & Co. had an insurable interest in the 102 bales of cotton, inasmuch as by the terms of the bill of lading, signed by their agent, and by which they were bound, the cotton was at their risk; that the usage, as stated in the case, was binding, since it was not unreasonable, and by virtue of it the declaration on the policy could be rectified even after the loss was known; that even apart from the usage as stated, the doctrine to be deduced from the authorities is that, according to the usage of merchants and underwriters recognized by the Courts without parol proof in each case, a declaration may be altered even after the loss is known, if such alteration be made without fraud, of which there was no evidence in the present case; and that the plaintiff was, on these grounds, entitled to recover the value of the 102 bales on the policy of the 29th of March.

SPECIAL CASE. The facts of the case and the arguments sufficiently appear from the judgments.

Nov. 20, 1871. *Holker, Q.C.* (*Watkin Williams* with him), for the plaintiff.

Honyman, Q.C. (*G. Bruce* with him), for the defendants.

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In addition to the cases referred to in the judgments, the following cases were cited: *Harman v. Kingston* (1), *Kewley v. Ryan* (2), *Henchman v. Offley* (3), and *Robinson v. Touray*. (4)

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Cur. adv. vult.

Nov. 21, 1872. The judgment of the Court (Keating and Brett, JJ.) was delivered by

BRETT, J. (5) In this special case the facts stated which seem to be material are, that the plaintiff acted in London as insurance broker for Messrs. Chapple & Co., shipowners; that they were owners of a line of steamers plying between Alexandria and Liverpool; that their agent at Alexandria was Mr. Grace; that during the American war Chapple & Co. were extensively engaged in carrying cotton from the Levant to Liverpool; that part of the cotton was frequently carried on deck; that some cotton was so carried by the request and then at the risk of the shipper, and for a less freight; that in such case it was the practice that it should be stated in the bill of lading that the cotton was on deck by the shipper's request and at his risk; that some cotton was carried on deck by the shipowner in order to enable him to carry a larger cargo; that in such case it was at the shipowner's risk; that in such case he gave a clean bill of lading; that shipowners who carried deck loads for their own convenience, and therefore at their own risk, often protected themselves against probable loss by jettison, by keeping on foot open policies, especially effected to cover the risk, and by declaring upon them. The case then contained the following statement as to usage: "According to the usage of the insurance business, when a policy is effected on goods by ship or ships to be thereafter declared, the policy attaches to the goods as soon as and in the order in which they are shipped; and directly the assured knows of the shipment of the goods he is bound to declare them to the underwriter on the policy, and to declare them in the order in which they are shipped. He is not entitled to

(1) 3 Camp. 150.

(2) 2 H. Bl. 343.

(3) 2 H. Bl. 345, n.

(4) 3 Camp. 158; 1 M. & S. 217.

(5) Willes, J., had agreed to the judgment, but his death took place before it was delivered.

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declare some of the risks, and remain his own insurer as to the others. In case by oversight or otherwise the goods are declared on the policy in an order different from that in which they were shipped, the assured is bound to rectify the declarations and make them correspond with the order of shipment. The underwriter would require to see the bills of lading, and could insist on the declarations being made to follow the sequence of the bills of lading. The declarations are often thus rectified, and sometimes even after loss."

In 1864 and 1865 Messrs. Chapple & Co., through the plaintiff, their broker, effected in London with the defendants and others certain policies on cotton on deck per steamer or steamers from Asia Minor to Liverpool. The first set of such policies was made on the 29th of March, 1864, to the amount of 25,000*l.*, and the second set was made for a further sum of 25,000*l.* to follow on the 12th of January, 1865. In the autumn of 1864, and at the beginning of 1865, Messrs. Chapple & Co., by Grace, their agent at Alexandria, shipped thence in various steamers cotton on deck at their risk and cotton below. Declarations were made on the cotton shipped on deck on the policies before mentioned in the order of shipments in respect of all the cotton shipped on deck except in respect of one parcel shipped on board the *Behera*. Such declarations were made in London by the plaintiff upon information of the shipments forwarded by Grace to Chapple & Co. The declarations on the policies of the 29th of March, 1864, were made as follows:—

29th Oct. 1864,	3400 <i>l.</i> on	68 bales per	<i>Lybia</i> .
29th Nov. "	7000 <i>l.</i> "	102 "	<i>Ajax</i> .
10th Dec. "	2500 <i>l.</i> "	44 "	<i>Ocean King</i> .
31st Dec. "	1200 <i>l.</i> "	20 "	<i>Behera</i> .
9th Jan. 1865,	7000 <i>l.</i> "	115 "	<i>Nyanza</i> .
16th Jan. "	3900 <i>l.</i> "	81 "	<i>Nyanza</i> .
25,000 <i>l.</i>			

Declarations were also made, but not to the full amount on the policy of the 12th of January, 1865. It afterwards appeared that under the circumstances stated in the case, Messrs Choremi, Mellor, & Co. had shipped 102 bales of cotton on board the *Behera* at Alexandria on the 20th of December, 1864, that is to

say, before the shipment on board the *Behera* of twenty bales on the 31st of December, and before the shipments on board the *Nyanza* of the 9th of January and the 16th of January, 1865. The 102 bales were directed to be received, and were, in fact, received to be shipped on deck at shippers' risk, but, by mistake, a clean receipt was given for them by the mate, and a clean bill of lading by Grace. He, however, supposing always that the 102 bales had gone at shippers' risk, did not advise the plaintiff to declare them, and they were not declared. The *Behera* sailed from Alexandria and encountered heavy weather, and on the 15th of January, 1865, the 20 bales and the 102 bales were jettisoned. The loss became known to Chapple & Co. on the 18th of January, 1865. The vessel arrived in Liverpool on the 19th of January. On the 25th of January, 1865, Messrs. Mellor & Co. of Liverpool claimed payment of the value of 102 bales as being owners of a clean bill of lading given in respect of them. The plaintiff, on the 27th of January, 1865, altered the declarations on the policies of the 29th of March, 1864, as follows: he struck out the "7000*l*. on 115 bales per *Nyanza*" and "3900*l*. on 81 bales per *Nyanza*," and replaced those declarations as follows:—

" 9th Jan. 1865, 6000*l*. on 102 bales per *Behera*,
 " " 4900*l*. „ part of 115 „, *Nyanza*."

He at the same time altered the declarations to correspond on the policies of the 12th of January, 1865. A portion of the policies of the 12th of January, 1865, sufficient to cover the loss on the *Behera* deck cargo remained still undeclared, and the plaintiff on the 27th of January, 1865, filled up the said policies by declaring, amongst other declarations, "6000*l*. on 102 bales per *Behera*."

On these facts it was argued before us, on behalf of the plaintiff, that Chapple & Co. had an insurable interest; that although the intention of the shippers at the time of shipment was, in fact, that the goods should be carried on deck at their risk, and although, at the same time, it was the intention of Messrs. Chapple's agent, Mr. Grace, to receive them to be carried on deck at shippers' risk, yet inasmuch as Grace had, by mistake or negligence, given a clean bill of lading, Messrs. Chapple & Co. could not protect themselves against the holders thereof in respect of the loss by jettison, even though such holders might be identical with

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the shippers; that Chapple & Co., therefore, stood to lose by a jettison by reason of perils of the sea, and were therefore so far interested as to be entitled to insure against such loss. It was further contended on behalf of the plaintiff, that Chapple & Co. were insured against the loss which had occurred on and by virtue of the policies of the 29th of March, 1864; that, by the usage of insurance business, they were not only entitled, but bound, to rectify the declarations on that policy as they had done, and that the declarations were to be read as if the shipment of the 102 bales on the 20th of December, 1864, had been declared in due order; and that the declarations might be properly altered after the loss was known. It was contended on behalf of the defendants that the shipowners, Messrs. Chapple & Co., were not bound by the mistake or negligence of Grace in signing a clean bill of lading; that under the circumstances he had no authority to sign any but a bill of lading expressing that the goods were shipped by the request of the shippers, and at their risk; that Messrs. Chapple & Co., not being bound by the clean bill of lading, were at no risk, and therefore had no insurable interest; that if they had such interest it was not insured, for that by the recognized law of insurance the assured were not bound to declare the goods which they shipped in the order of shipment; that they were not bound to declare all shipments; that they could not, after they had once declared, alter such declarations; that even if they could at some time alter such declarations, they could not do so after the loss and their knowledge of it; that they were bound to declare within a reasonable time after shipment; that, if they did not, a subsequent declaration was void; that no declaration could be properly made after loss and knowledge of it; that consequently in this case the loss which had occurred was not insured by either policy.

The first point raised by these arguments is, whether Messrs. Chapple & Co. had an insurable interest. We are of opinion that they had. It may be true that Grace was not in one sense authorized to sign a clean bill of lading under the circumstances, but it is in the sense that his duty to his principals required him not negligently to sign in that form; he had the authority so frequently given to agents in his position, that is, to sign bills of lading as and

for the master of the ship, and therefore his signature was equivalent to that of his principals, Messrs. Chapple & Co., and made the bill of lading their contract, and a contract in writing applicable to the goods shipped under it; the effect of which, according to a legal construction of the written contract contained in it to be declared by the Court, could not at law be varied by evidence that it was signed in its existing form by negligence or mistake. The bill of lading, according to its legal construction, made Messrs. Chapple & Co. liable for a loss of the goods by jettison, the result of their being carried on deck; it follows that Chapple & Co. had an insurable interest.

The next question raised, is whether Chapple & Co. were insured in respect of the risk on the 102 bales of cotton on board the *Behera*. Now the usage stated in the case is a large usage, more comprehensive, we believe, than it has been proved or assumed to be in any of the cases which are in the books relative to this matter; but if it is not unreasonable, it is binding on the Court in this case. We are not prepared to say it is unreasonable; it follows that it is binding. Then it seems clear that Chapple & Co. were insured by the policies of the 29th of March: for the 102 bales on board the *Behera* were shipped on board on the 20th of December, 1864, when the policies were not exhausted by prior shipments to which they were applicable, and Messrs. Chapple & Co. were bound to rectify the declarations, and make them correspond with the order of shipment. It seems to us that the usage, as now stated, makes the case of *Gledstanes v. Royal Exchange Assurance* (1), and *Ionides v. Pacific Insurance Co.* (2) inapplicable. But if that be not so, we still think the plaintiffs, on the statements made in this case, are entitled to recover. The doctrine to be deduced from those cases is that, according to the usage of merchants and underwriters, as recognized by the Courts without formal proof in each case, a declaration of this kind, which it is the right of the assured to make without the consent of the underwriter, may be altered even after the loss is known, if it be altered at a time when it can be, and is altered innocently and without fraud. If that be a true proposition, and we think it is, and if it be applicable in this case, we think that

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(1) 5 B. & S. 797; 34 L. J. (Q.B.) 30. (2) Law Rep. 6 Q. B. 674.

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the alterations made on the 27th of January, 1865, in the declarations on the policies of the 29th of March, 1864, were legally made. At that time the loss of the goods by jettison was known to the assured; but the state of things at the time of shipment was not known to them. They seem to have made the alteration in the bonâ fide belief that their agent had neglected to inform them of the shipment by the *Behera*, and with a bonâ fide intention of rectifying the mistake according to the custom. There is no finding in this special case that they acted otherwise than innocently and without fraud. The judgment must therefore be for the plaintiff, as upon a loss upon the policies of the 29th of March, 1864, in respect of the loss by jettison of goods loaded on board the *Behera*.

Judgment accordingly.

Attorneys for plaintiffs: *Westall & Roberts*.

Attorneys for defendants: *Waltons, Bubbs, & Walton*.

Nov. 23.

HUNTER, JUDGMENT CREDITOR; GREENSILL, JUDGMENT DEBTOR;
PAGET, GARNISHEE.

Attachment of Debts—Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125) ss. 60, 61—Garnishee Clauses—Surplus of Bankrupt's Estate—"Debt"—Official Assignee.

4 CD 639
v 1184 J An order having been made for the attachment of the surplus of a bankrupt's estate against the official assignee of the Court of Bankruptcy as garnishee, under the Common Law Procedure Act, 1854:—

Held, that such order was invalid, there being no "debt" that could be attached within the meaning of the Act.

In this case an order had been obtained for the attachment of certain moneys, under the Common Law Procedure Act, 1854, s. 61, the garnishee being official assignee of the Court of Bankruptcy.

It appeared that the judgment debtor had been bankrupt in 1867, and the moneys in question consisted of the surplus of the estate after the payment of 20s. in the pound to all the creditors under the bankruptcy. No creditors' assignee had ever been appointed.

Lumley Smith had obtained a rule nisi to set aside the order of

attachment, on the ground that there was no debt which could be attached within the meaning of the garnishee clauses of the Common Law Procedure Act, 1854.

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The order was in the ordinary form, attaching the debt and ordering that the garnishee should appear and shew cause why he should not pay the debt to the judgment creditor.

Barrow shewed cause. The estate of the bankrupt is vested in the official assignee by virtue of 12 & 13 Vict. c. 106, s. 40. He is, therefore, in contemplation of law, the holder of this property. It must be admitted that he could not pay over this money to the bankrupt without an order of the Court of Bankruptcy (12 & 13 Vict. c. 106, s. 197). But although the fruits of the order for attachment cannot be obtained without such order of the Court of Bankruptcy, it is contended that the order is good, so far as attaching the debt is concerned, and will give priority over other claims.

[BOVILL, C.J. The difficulty seems to be that the statute relates to debts only. The debtor could not sue the garnishee for this money.]

No order has been made that the money should be paid over, and no doubt this Court could not make such an order, but the order may well stand for the purpose of attaching the debt. It was held in *Ex parte Marshall Turner* (1), that the garnishee clauses of the Common Law Procedure Act, 1854, apply to funds in the hands of an official manager of a joint stock company in the process of being wound up, where the company is indebted to a judgment debtor of the creditor. The same argument was there used against the order as will be relied on in the present case. The effect of the order may be that the Court of Bankruptcy will order payment to the judgment creditor.

[BOVILL, C.J. You call on us to uphold the order, though you admit we cannot enforce it, but another Court must do so.]

The judgment creditor is entitled to every advantage that this Court can give him for the enforcement of its own judgment in his favour. If the order does no good, it does no harm. It may have the effect of giving priority over other claims, and if so, the

(1) 2 D. F. & J. 374; 3 L. J. (Ch.) 92. *Greenhill* 1172

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judgment creditor is entitled to it: *Sparks v. Younge* (1) is a direct authority that this part of the order attaching the debt may stand, though there is no power to order payment of it to the judgment creditor.

[BOVILL, C.J. The question is on the construction of the Act, whether there was jurisdiction to make the order, which depends on whether there was a debt or not.]

[He also cited *Russell v. East Anglian Ry. Co.* (2), *Ames v. Trustees of the Birkenhead Docks* (3), *De Winton v. Mayor of Brecon*. (4)]

Lumley Smith supported the rule. *Kennett v. Westminster Improvement Commissioners* (5) is an authority to shew that the official assignee is entitled to have this order set aside if there be not a debt within the Act. There is not in the present case a debt within the Act, and therefore the order was made without jurisdiction. The official assignee has no control over this money whatever. All he has to do under the Bankruptcy Act, is to receive the proceeds of the estate, and pay them into the Bank of England to the credit of the accountant in bankruptcy. All dealings with the moneys so paid into the bank are by order of the Court of Bankruptcy. The official assignee does not himself pay dividends to the creditors, he only draws a warrant for them. The surplus, if any, never comes into the hands of the assignee: See rules and orders under the Bankrupt Law Consolidation Act, 1849 (137, 138, 148, 149). In *Boyse v. Simpson* (6) it was held that dividends under a bankruptcy could not be attached. The case of *De Winton v. Mayor of Brecon* (4) is strong to shew that such an order as this cannot be supported. The case of *Ex parte Marshall Turner* (7) appears to be hardly an authority on the subject. The garnishee order in that case seems to have been made by consent, and the decision really turned on another question than the validity of the order.

[He also cited Griffith and Holmes on Bankruptcy, 852.]

BOVILL, C.J. I am of opinion that the present case does not come within the provisions of the garnishee clauses of the Common

(1) 8 Ir. C. L. 251.

(4) 28 Beav. 200.

(2) 3 Mac. & G. 104; 20 L. J. (Ch.)

(5) 11 Ex. 349; 28 L. J. (Ex.) 97.

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(6) 8 Ir. C. L. 523.

(3) 20 Beav. 332; 24 L. J. (Ch.) 540.

(7) 2 D. F. & J. 354; 30 L. J. (Ch.) 92.

6 June MS. 529.

6 June MS. 1172

Law Procedure Act, 1854. All those clauses, and the machinery thereby provided, apply to debts, and debts only. It was conceded by Mr. Barrow that under this order the garnishee would not be justified in paying the amount over to the judgment creditor. In the cases in the Court of Chancery, the Court has disallowed such payment when made by a receiver; as, for instance, in the case of *De Winton v. Mayor of Brecon* (1). It was urged that there is not any order to pay the debt; it being admitted that such an order could not properly be made nor enforced. The result of the contention is this, that an order can be made to attach money, which the garnishee would not be justified in paying, and of which the judgment creditor could not enforce payment, and as to which all the machinery provided by the Common Law Procedure Act is wholly inapplicable. It is not admissible, in my opinion, to put one construction on one of the clauses of the Act relating to this subject, with regard to the meaning of the word "debt," and another construction on another. There is no "debt" here; the garnishee has no doubt certain sums of money vested in him, which may or may not be payable to the bankrupt in the event; but which can only be so payable by means of an order of the Court of Bankruptcy. The authorities strongly support the conclusion at which I have arrived. The case of *Boyse v. Simpson* (2) is a very strong authority to shew that such an order as the present cannot be made. The question arose there under the Irish Act, which corresponds in its terms with the English Act; and the reasons for that decision, which were very fully given by Pigot, C.B., seem to me conclusive of the present case. Mr. Barrow relied very strongly on the decision in *Ex parte Marshall Turner* (3). That case does not appear to me, when fully considered, to be an authority on the present question at all. It was contended that the judgment in that case decided that money might be attached in the hands of an official manager. But the only question really at issue was as to priority between two petitioners; on the case coming on to be heard, the counsel for the official manager stated that his client's only desire was to get rid of the money; but he wished to be protected in so doing. In the end, priority was given to Smith, not on

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GREENSILL.(1) 28 Beav. 200. *6/11/72* H.S. 1046 (2) 8 Ir. C. L. 523.(3) 2 D. F. & J. 354; 30 L. J. (Ch.) 92. *6/11/72* H.S. 1172

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the ground of the garnishee order, but by virtue of a prior charge upon the estate. It was urged that there was an order of attachment in that case and an affirmance by the Lords Justices of its validity. But it appears that it was, in accordance with the usual practice in such cases, in the first instance refused by Willes, J., but that eventually he made the order on the undertaking of the applicant, that it should not be acted on in any way, except under the order of the Court of Chancery, and the case being ultimately brought before that Court, was disposed of on other grounds. It does not appear to me that a case so peculiar in its circumstances is a very satisfactory authority to shew that such a case as the present is within the Act. Moreover, in the judgment of James, L.J., he treats the attachment as one against the company. He says, "In fact, it is upon a debt due from the company, and the official manager has money in his hands to pay the debt, independently of any question as to how the fund arose." If in equity the attachment was treated on this footing, and the company had money, there was no reason why the Court should not make the order it did. It was not necessary, in such a case, to determine very accurately the meaning of the garnishee sections of the Common Law Procedure Act. It appears to me quite clear that such a case as the present is not within those sections, and I quite concur in the decision in the case of *Boyse v. Simpson*. (1) The rule must therefore be made absolute.

DENMAN, J. I am of the same opinion. I do not think this is the case of a debt within the meaning of this Act. The only case cited that seemed at first to tend to the contrary view when examined appears to be really no authority on the subject.

Rule absolute.

Attorney for garnishee: *Aldridge*.

Attorney for judgment creditor: *Edwin Hughes*.

(1) 8 Ir. C. L. 523.

TICHBORNE, BART. *v.* SIR PYERS MOSTYN, BART., AND ANOTHER.

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*Ejectment—Stay of Proceedings until Payment of Costs of a former Ejectment—
Notice to proceed under s. 202 of the Common Law Procedure Act, 1852—
Surprise.*

May 2. *

To entitle a defendant in ejectment to apply for a stay of the proceedings until the costs of a former unsuccessful action of ejectment are paid, it is not necessary that the parties should be precisely the same, or the premises sought to be recovered identical; it is enough that the plaintiff is the same in both actions, and that the same title in substance is in issue.

To induce the Court to abstain from acting upon this rule, it must be clearly made out that the plaintiff's want of success on the former occasion was the result of perjury or fraud, or some miscarriage for which he was not responsible.

Before moving for a stay of the proceedings, the defendants had given the plaintiff the twenty days' notice to proceed, under s. 202 of the Common Law Procedure Act, 1852:—

Held, that this was no waiver of their right to move for a stay of the proceedings until the former costs should be paid.

But, the probable amount of the costs being large, the Court made it a condition that the time for proceeding to trial should be extended by six months.

EJECTMENT for the recovery of a messuage and premises in Gray's Inn Road, forming part of an estate called the Doughty estate. The writ was dated the 29th of June, 1868. The now defendants were allowed to appear and defend as landlords, the appearance of the original defendants (tenants and undertenants of the premises) having been struck out by an order dated the 14th of November, 1868.

The now defendants are the trustees (substituted by an order of the Court of Chancery made on the 5th of December, 1857, and an indenture dated the 3rd of October, 1862,) under the will of the late Roger Charles Tichborne, deceased, which was proved in the Prerogative Court of Canterbury on the 17th of July, 1855, by the executors therein named, evidence having been first given of the supposed death at sea of Roger Charles Tichborne on or about the 26th of April, 1854.

At the time of the supposed death of Roger Charles Tichborne, he was entitled, under settlements dated respectively the 4th of May, 1844, and the 10th of May, 1850, on the death of his father, Sir James Francis Doughty Tichborne, Bart., now deceased, to

* Decided in Easter Term, 1872.

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interests in certain estates called the "Tichborne" and "Doughty" estates, to hold as follows,—as regards the former, as tenant for life, with remainder to his sons in tail male, and, in default of issue, to the second and other sons of Sir James F. D. Tichborne for life, with remainder to their sons in tail male; and, as regards the latter, as owner in fee.

Under the will of Roger Charles Tichborne, the Doughty estate, of which he was entitled to the ownership in fee, devolved upon the defendants, to hold in trust, after the payment of certain charges, for the benefit of Sir Henry Alfred Joseph Doughty Tichborne (the only son of the late Sir Alfred Joseph Doughty Tichborne, the younger brother of Roger Charles Tichborne), a minor. Under the trusts of the before-mentioned settlements of the Tichborne estate, the infant, Sir Henry Alfred Joseph Doughty Tichborne also became entitled, as heir male of Sir Alfred Joseph Doughty Tichborne, deceased, to the Tichborne estate.

The plaintiff in this action claims to be the Roger Charles Tichborne who was supposed to have been lost at sea; and, at or about the same time as the writ in this case was issued, the plaintiff commenced another action of ejectment in this Court, intituled *Tichborne v. Lushington*, for the recovery of the Tichborne estate, the defendant Lushington being one of the tenants on that estate; in which action the sole issue to be tried was, the identity of the plaintiff with Roger Charles Tichborne.

In the action of *Tichborne v. Lushington*, Dame. Teresa Mary Josephine Doughty Tichborne and the Hon. William Stourton, as guardians of Sir Henry Alfred Joseph Doughty Tichborne, were by order let in to defend. That action was tried in this Court before Bovill, C.J., and a special jury. The case on the part of the claimant being closed, and counsel for the defendants having addressed the jury at considerable length, and several witnesses having been called to contradict the plaintiff's evidence, the foreman of the jury upon Monday, the 102nd day of the trial, addressing himself to the Chief Justice, read from a written paper the following: "We have now heard the evidence regarding the tattoo-marks; and, subject to your Lordship's direction, and to the hearing of any evidence that the counsel desire to place before us, I am desired to state the jury do not require further evidence."

Mr. Serjeant Ballantine thereupon applied for an adjournment, in order to enable him to consider this statement and to consult with Mr. Giffard (then on circuit) and the other counsel engaged with him for the plaintiff. It was accordingly arranged that the trial should be adjourned until the following Wednesday,—the foreman of the jury observing, “It is quite clearly understood, of course, that it is subject to the hearing of any evidence which your Lordship or the counsel may desire.” At the sitting of the Court on the Wednesday, Mr. Serjeant Ballantine, with the assent of his client, and having had a communication from Mr. Giffard, elected to be nonsuited.

The costs of the action of *Tichborne v. Lushington*, which it was sworn would exceed 40,000*l.*, were unpaid, and, by reason of the bankruptcy of the claimant (1), were not likely to be paid.

In the present action,—which was brought for the recovery of the Doughty estate, the issue in which was the same as in the former action, viz. the identity of the claimant with Roger Charles Tichborne, and in which the same title was involved, and the parties substantially though not nominally the same,—notice of trial was given on the 25th of July, 1868, for the first sitting in the then next Michaelmas Term: but, the proceedings having been stayed partly by order and partly by the tacit understanding of the parties, nothing further was done therein until the 11th of March, 1872, when the following notice, pursuant to s. 202 (2) of the Common Law Procedure Act, 1852, was served upon the plaintiff’s attorneys: “We (3) hereby give you notice and require you in twenty days from the date hereof to proceed to trial in this action at the sittings next after the expiration of such twenty

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(1) He was adjudicated a bankrupt on the 29th of June, 1870, and still remained uncertificated.

(2) “If after appearance entered the claimant, without going to trial, allow the time allowed for going to trial by the practice of the Court in ordinary cases after issue joined to elapse, the defendant in ejectment may give twenty days’ notice to the claimant to proceed to trial at the sittings or assizes next after the expiration of the notice; and,

if the claimant afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, and the time for going to trial shall not be extended by the Court or a judge, the defendant may sign judgment in the form contained in the schedule (A.) to this Act annexed, marked No. 19, and recover the costs of defence.”

(3) The defendants’ attorneys.

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days, and that, if you neglect to give notice of trial for such sittings, judgment will be signed against you according to the form in that case provided."

By an order of the 23rd of March, 1872, the plaintiff's attorneys were changed, and leave to amend the issue was obtained, and the amended issue was delivered on the 27th, with notice of trial for the first sitting in Easter Term. A correspondence then ensued between the respective attorneys, the plaintiff's attorneys proposing and the defendants' attorneys objecting to a postponement of the trial of this cause until after the plaintiff should have been tried upon an indictment for perjury preferred against him under an order made by the Chief Justice at the trial, under 14 & 15 Vict. c. 100, s. 19; and on the 13th of April, 1872, the defendants' attorneys gave notice of their intention to make the cause a special jury cause.

Hawkins, Q.C. (H. Matthews, Q.C., and H. F. Purcell, with him), moved for a rule calling upon the plaintiff to shew cause why the proceedings in this action should not be stayed until the costs of the action of *Tichborne v. Lushington* were paid. He also intimated that he should move for security for costs; but this part of the motion was ultimately abandoned. He submitted that, to entitle the defendants to make this application, it was not necessary that the parties to the two actions should be *precisely* the same, but that it was enough if they were *substantially* the same, provided the title and the issue to be tried were the same in both actions; that there was nothing inconsistent in asking for such a rule and still holding to the notice under s. 202 of the Common Law Procedure Act, or that, if the two proceedings were inconsistent, the only consequence would be that the notice was waived, or the Court might if they thought fit extend the time for proceeding to trial under it.

Giffard, Q.C., shewed cause in the first instance. The parties to this and the former action are not the same, nor is the property sought to be recovered the same. The persons on whose behalf this motion is made are not the persons entitled to the costs of the former action, which are a charge upon the Tichborne estate, and not upon the estate which is the subject of this action. Besides,

the Courts never interfere in this way, or by the analogous course of ordering security for costs, where it appears that the former verdict had been obtained by fraud and perjury,—*Doe d. Rees v. Thomas* (1), or the plaintiff has not had an opportunity of having a fair trial; nor after the defendant has taken a step in the cause: *Muller v. Gernon*. (2) The rule upon which this application is based is not an inflexible one: it is only granted where the plaintiff is proceeding vexatiously, or where injustice would otherwise be done. The notice to proceed, given by the defendants under the 202nd section of the Common Law Procedure Act, 1852, is clearly inconsistent with the present application, and operates as a waiver of the defendants' right to make it. The circumstances under which the former trial was brought to a premature close would have justified an application for a new trial on the ground of surprise. The plaintiff was taken by surprise by the evidence given for the defendant.

Hawkins, Q.C., H. Matthews, Q.C., and Purcell, in support of the motion, relied on *Doe d. Chadwick v. Law* (3); *Harvey d. Beal v. Baker* (4); *Prowse v. Loxdale*. (5) They further submitted that a rule for a new trial on the ground of surprise is never granted except on payment of costs.

[BOVILL, C.J., referred to *Doe d. Brayne v. Bather*. (6)]

BOVILL, C.J. The application now made to the Court is, that the proceedings in the present action of ejectment be stayed until the costs of the former action of *Tichborne v. Lushington*, in which the present plaintiff was nonsuited, shall have been paid. Mr. Hawkins intimated, in the first instance, that he meant also to ask for security for costs; but he has not pressed that part of the motion. The case, therefore, stands before us upon the simple question whether this Court will, under the circumstances, order that the proceedings in this action be stayed until the plaintiff has paid the costs of the former action.

It is perfectly plain, from the affidavits and the statements of counsel on both sides, that the question at issue in both actions is

(1) 2 B. & C. 622.

(2) 3 Taunt. 272.

(3) 2 W. Bl. 1158.

(4) 2 Dowl. (N.S.) 75.

(5) 3 B. & S. 896; 32 L. J. (Q.B.) 227.

(6) 12 Q. B. 941.

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precisely the same. I do not mean to say that there may not be some differences in the formal proofs of title in the two cases; but in both the plaintiff is the same, and the substantial question to be tried is the same, viz. whether or not the plaintiff is Sir Roger Charles Tichborne, Bart. It is true that the defendants in the two actions are not the same; and in truth there is scarcely an instance of two actions of ejectment brought upon the same title where the parties are precisely the same. The action is usually brought by the person claiming to be entitled to the estate against a tenant in possession of some part of it. Here, the first action was brought against Colonel Lushington as the occupying tenant of Tichborne House; the second action, which was brought in respect of what is called the Doughty estate, was brought against the occupying tenants of premises forming part of that estate, the trustees of the settlements relating to that estate being let in to defend as landlords. The parties who appeared and defended in the first action were, as here, the trustees and guardians of the infant son of the late Sir Alfred Tichborne, Bart. Substantially, therefore, the defendant in each case is the infant, the parties appearing on the record to defend being in one sense mere nominal parties, having only the dry legal interest vested in them. There are somewhat different limitations in the settlements with regard to the two estates. The trustees of the Doughty estate are not the trustees of the Tichborne estates; and hence it is that the parties, so far as the defendants are concerned, are not the same in both actions: but the question at issue is precisely the same in both.

The plaintiff, having failed in the first action, and having elected to be nonsuited, now seeks to try precisely the same question with the trustees of the infant heir, in an action to recover possession of the Doughty estate; and this without recouping the defendant, who, as I before observed, is substantially the same in both cases, the expenses incurred in defending the right on the former occasion.

Now, where a matter of this kind has been fully investigated in a Court of law, and the plaintiff has failed to establish his claim, it has long been the practice of the Courts to interpose, in order to prevent the defendant being put to great, and it may be ruinous, expense in defending his possession in a second action, until the

costs of the first proceeding have been paid. That has been the practice from a very early period ; and I am at a loss to discover any ground upon which we can be called upon to abstain from applying that rule in the present case. The result of this motion is doubtless of great importance to the parties. It has been argued before us at considerable length, and with great force and ability : and I think it right to go through the principal authorities which bear upon the subject.

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The rule with regard to actions of ejectment is to be found in all the books of Practice. In the 9th edition of Tidd's Practice, published so long ago as the year 1828, there is the following passage at p. 1232 :—"In a second ejectment, the Courts will stay the proceedings until the costs are paid of a prior one for the trial of the same title, and also the costs of an action, if any has been brought, for the mesne profits ; and it matters not whether the second ejectment be brought by the lessor of the plaintiff or by the defendant in the former one, or by or against all or some of the parties, or by a third person under whom the lessor of the plaintiff claims, or for the same or different premises, so as it be on the same title and for part of the same estate ; nor whether it be brought in the same or a different Court. The length of time which has elapsed between the first and second ejectment is not material ; for, there may be many good reasons why the defendant did not call for the costs sooner,—such as, poverty of the other party, or in order to quiet any further controversy. The vexation of the party is said to be the foundation of these rules ; and therefore, when there appeared to be no vexation, the Courts would not formerly have made a rule for staying proceedings until the costs were paid of a prior ejectment. But the practice in that respect is altered, and it is now settled that the proceedings may be stayed in all cases until the costs are paid of a former ejectment ; and the Courts will stay them if the conduct of the party against whom the application is made has been vexatious or oppressive, although he is not liable to the costs of the first action : but they will not stay the proceedings in the second action where the party is already in custody under an attachment for non-payment of the costs of the first action, nor, as it seems, if it appear that the verdict in the former action was obtained by fraud and perjury.

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So, the Court of Common Pleas would not stay the proceedings in a writ of right till the costs of a prior ejectment were paid; and the Court of King's Bench refused to stay the proceedings in ejectment until the taxed costs were paid of a suit in equity brought by the same party for the recovery of the same premises: so, in a second ejectment by a pauper, the Court, we have seen, refuse to grant a rule for staying the proceedings until the costs were paid of a prior ejectment for the same cause; but it was admitted that he would not in such second action be allowed to sue in formâ pauperis. And, where a rule had been obtained for staying the proceedings in ejectment till the costs of a former ejectment were paid, the Court would not interfere and permit the defendant, in case those costs were not paid before a certain day to be named by the Court, to non-pros. the second ejectment. If there be judgment for the plaintiff in ejectment, and the defendant bring a writ of error, the Court of King's Bench will not suffer the latter to proceed in a new ejectment on the same title till he has quitted possession, or the tenants have attorned to the lessor of the plaintiff. So, if there be judgment for the defendant in ejectment, and the lessor bring a writ of error, the Court will not suffer him to proceed in a new ejectment on the same title, until the costs are paid of the former ejectment." Nothing can be more clear than the rule there laid down; and this case falls within it.

But I think it right to call attention to one or two other cases which have been decided upon this subject. The first which I will mention is *Keene d. Angel v. Angel*. (1) There, a rule nisi had been obtained for staying the proceedings until the costs of a former ejectment brought by the same lessor of the plaintiff were paid. Three objections were taken:—"First, that the defendant had been guilty of laches in not having before applied for the costs of the former nonsuit, which was in 1793 (the motion for a stay of proceedings not being made till 1796), the costs of which had not been taxed till Hilary Term last. Secondly, there is another defendant now, who was not a party to the last ejectment. Thirdly, the present ejectment is for different lands, in a different county." Lord Kenyon, delivering the judgment of the Court, said: "The only question in this case is, whether the second ejectment is in

(1) 6 T. R. 740.

substance brought to try the same title : if so, the rule is of course to stay the proceedings until the costs of the former ejectment have been paid. As to the laches, as it is called, of the defendant in not calling for the costs of the former nonsuit before, that is rather in favour of the lessor of the plaintiff than a ground of objection on his part ; and there may be many good reasons for such a proceeding on the part of the defendant, such as, the poverty of the other party, or a view to quiet any further controversy. In *Doe d. Duchess of Hamilton v. Hatherley* (1), there was a much longer period intervening between the two ejectments, viz. from the 6th George the 1st to the 14th George the 2nd ; but that was held no objection to such a rule as the present." There is another and a more recent case, and one which has a very important bearing on the present application. I called Mr. Giffard's attention to it in the course of his argument ; but, though he admitted that he was aware of it, he did not attempt either to contest the propriety of the decision or to distinguish it from the present case ; and this probably for the best of all reasons, viz. that it is entirely in accordance with the rule which has so long prevailed in the Courts, and that it has so close a bearing upon the facts and circumstances of this case that it would be utterly impossible to point out any substantial distinction. The case I allude to is *Doe d. Brayne v. Edward Bather*. (2) Lord Denman, in giving judgment, said (3) : " We cannot but see that the present action relates to part of the estates devised by the will which was in question before, and that the same party as lessor of the plaintiff is trying to establish in this action what he then failed to establish." Coleridge, J., said (3) : " John Brayne was a defendant in the former ejectment brought by a devisee of William Brayne, of which the costs have not been paid. Now he, with his wife as a joint lessor of the plaintiff, brings an ejectment against another devisee of William Brayne, drawing into question the validity of the same will. It is contended that the present defendant was not put to vexation by the former suit, and that the present action is new as to the lessors of the plaintiff. But, if the wife has a claim, it must be as a devisee under the will. We are not to assume that

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(1) 2 Str. 1152.

(2) 12 Q. B. 941.

(3) 12 Q. B. at p. 948.

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she has a separate property in the land to be recovered. Her husband, therefore, claims a present interest in the land, which interest he seeks to enforce by again litigating the title already tried. This being so, we ought not to refuse the rule simply because the defendant is not the same as before. It is sufficient here that the party on the one side is the same, the property (for this purpose) the same, and the same question raised by the suit." And Erle, J., with reference to this last point, said (1): "It is said that the defendant here is a stranger to the former suit. Co-devisees would, I think, clearly have a joint interest in sustaining the will: but I do not consider it necessary to put the decision upon that point. It is enough that John Brayne, the lessor of the plaintiff, was party to the former ejectment as well as this, and the question raised is the same in both."

Adopting the language in all these cases, and the rule stated by Mr. Tidd, it is sufficient here that there is the same plaintiff, who is seeking to try the same question in both actions, and that he failed in the first by his counsel having elected to be nonsuited after a distinct intimation from the jury that they were prepared to find against him. That being the state of things, according to all the authorities he is not to be permitted to proceed to the trial of the second action until he has paid the costs of the former inquiry. When the Common Law Procedure Act, 1852, was passed, which to some extent substituted a new form of proceeding for the recovery of land in place of the old action of ejectment, it was thought right to enact (2) that the Courts and judges might exercise over the proceedings the like jurisdiction as theretofore exercised in the action of ejectment. The old practice, therefore, where not inconsistent with the changes introduced by that Act, still remains; and in accordance with that practice and with every precedent with which I am acquainted, I think the defendants are entitled to have this rule made absolute.

Several objections have been urged as to the power of the Court to grant this rule, and as to this being a fit case for the exercise of its discretion, if the power exists.

First, Mr. Giffard has contended that the defendants have waived their right to make this application, by giving the plaintiff

(1) 12 Q. B. at p. 949.

(2) By 15 & 16 Vict. c. 76, s. 221.

a notice to proceed, under s. 202 of the Common Law Procedure Act, 1852. The action being at issue, and having stood over for some years, the defendants naturally desire that it shall be brought to its proper termination in due course of law. The ordinary practice formerly was to force the plaintiff on by a series of rules and demands, and to sign judgment of non-pros. against him if he failed to proceed. Now, the Common Law Procedure Act, 1852, has provided, with regard to this action of ejectment, in s. 202, that "if, after appearance entered, the claimant, without going to trial, allow the time for going to trial by the practice of the Court in ordinary cases after issue joined to elapse, the defendant in ejectment may give twenty days' notice to the claimant to proceed to trial at the sittings or assizes next after the expiration of the notice; and, if the claimant afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, and the time for going to trial shall not be extended by the Court or a judge, the defendant may sign judgment" in a form given in a schedule to the Act. The plaintiff having failed in the first action, the only course the defendants in this action could adopt, in order to put a stop to further ruinous litigation, was, to give a notice under that section; and this was done in the hope, no doubt, that the claimant would submit to have judgment entered against him. The giving of the notice is a part of the proceedings in the cause for the purpose of bringing it to a termination. The notice having been given, the plaintiff complied with it as far as was in his power. The cause was set down for trial; and, being made a special jury cause, it would in the ordinary course have come on for trial at the sittings after next Trinity Term. I am at a loss to see how the giving of the notice under s. 202 can amount to a waiver by the defendants of their right according to the invariable practice of the Court to insist upon the costs of the former action being paid before the claimant is allowed to proceed to the trial of the second action.

The cases cited by Mr. Matthews seem to me to be quite conclusive. In *Doe d. Chadwick v. Law* (1), the case was not only standing for trial, but the witnesses had been brought to town for

(1) 2 W. Bl. 1152.

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the purposes of the trial ; and yet, notwithstanding the application was made so late, and the costs had not been taxed, the Court made the rule absolute to stay the proceedings in that action until the costs of a former ejectment should have been paid. The case of *Harvey d. Beal v. Baker* (1) is a still stronger authority. An ejectment having been brought in which the plaintiff failed, he brought a second, in which he succeeded, and signed judgment, and actually issued execution ; but the Court, nevertheless, stayed his proceedings until payment by him of the costs incurred in the former action. It is impossible, after those cases, to say that there has been any waiver here.

It has been further urged that there is no vexation in this case, and that that is a test as to whether or not the Court should in the exercise of its discretion grant this rule. It is not necessary, however, that vexation should be shewn. The passage I cited from *Tidd* is abundant authority that the practice as to that has been settled for more than forty years. The undoubted rule is, that, where a party has once failed, he is not at liberty to try substantially the same question in a second action without first paying the costs of the former trial.

It was further contended that the persons who would receive the costs are not the persons who are defendants in this action, that the persons making this application are not the persons entitled to the costs, and that the costs in question are a charge upon the Tichborne estate and not upon the estate sought to be recovered in this action. The whole of that, however, is disposed of by the authorities to which I have referred, in one or other of which every one of the circumstances which are urged here existed and was dealt with. Where the plaintiff is the same, and the question to be tried is the same, the rule must go, unless there be some special circumstances to warrant a departure from the ordinary practice. That there are exceptions to the general rule there can be no doubt. Mr. Giffard referred to *Muller v. Gernon* (2), to shew that a plaintiff resident abroad will not be compelled to give security for costs after the defendant has given an undertaking to accept short notice of trial. But there the defendant had delayed the proceedings by obtaining time to plead

(1) 2 Dowl. (N.S.) 75.

(2) 3 Taunt. 272.

on giving an undertaking to accept short notice of trial; and after that he sought further to delay the proceedings until security was given for costs. Under those circumstances, the Court properly held that it was not competent to the defendant to make the application.

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Mr. Giffard, further to shew that the rule is not inflexible, referred to a case of *Doe d. Rees v. Thomas* (1), where, upon the master's report that there was ground for believing that the former verdict had been obtained by means of fraud and perjury, the Court declined to stay the proceedings in a second action until the costs of the first were paid. But, in the case of fraud and perjury not discovered until after the trial, there is no limit to the power of the Court to interfere. Indeed, I remember an instance where the Court, after the lapse of several years, contrary to all its ordinary rules, granted a new trial, upon being satisfied that the verdict on the former trial had been obtained by fraud and perjury.

It was then insisted that the plaintiff was taken by surprise at the trial by the evidence given on the part of the defendants. But, the jury having, after an unusually protracted trial, deliberately pronounced an opinion which was equivalent to a verdict for the defendants, the plaintiff's counsel acquiesced, and elected to be nonsuited. I therefore think that it is entirely beside the mark to talk about surprise, or that the plaintiff has not had an opportunity of fairly and completely trying the question at issue.

The only matter which remains to be considered is that relating to the notice to proceed. Can we permit that to stand whilst we make the rule absolute to stay the proceedings? The amount which the plaintiff will have to pay as the condition of his being allowed to go on with this action is undoubtedly large; and the plaintiff is, as Mr. Giffard has said, a bankrupt and in prison. But, from what has been disclosed on all the applications which have come before me, it is impossible to shut one's eyes to the fact that there are persons behind with whose money this litigation is carried on. It is the position of almost every person claiming an estate under circumstances like these that personally he is unable to pay the costs. The very object of granting these rules is to

(1) 2 B. & C. 622.

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protect a defendant from being harassed by a second action to try a title upon which he has already succeeded, at the suit of a pauper: and, if the amount which the plaintiff is called upon to pay is a large one, it may on the other hand be said that the burthen imposed upon the estate of the infant is still greater. Under all these circumstances, therefore, I think the right course will be to make it part of this rule that the time for proceeding to trial under the defendants' notice should be enlarged for a period of six months. If the requisite sum is not found by that time, it is not very likely to be found at all.

BYLES, J. I am of the same opinion. This matter came before me at chambers, and I have had an opportunity of considering it. The application now before us is, that the proceedings in this action may be stayed until the costs of the former action of *Tichborne v. Lushington* have been paid. My Lord has gone fully into the authorities to shew that the land need not be the same or the defendant the same, provided that the question be the same. Here, we have the plaintiff precisely the same, the question to be tried precisely the same, and the same defendants in reality, although not nominally the same. It is true there was no verdict in the former case; but there is the unmistakeable expression of opinion by the jury, and the election of the plaintiff's counsel to be nonsuited, which for all practical purposes amounts to a finding of the jury. It seems to me that, according to all the decisions, we are bound to accede to this application. With regard to the notice to proceed, given under s. 202 of the Common Law Procedure Act, 1852, I apprehend the meaning and effect of that is this,—“Proceed according to the practice of the Court, but subject to any obstacles which the law allows us to place in your way.” I cannot help feeling that, under some circumstances, though certainly not under those of the present case, it might be a hardship on the plaintiff to be prevented from proceeding until so large a sum has been paid. But all we can do is to administer the law as we find it. The same title being in question, and the parties being substantially the same, the plaintiff is so far bound by the decision in the former action that the litigation cannot proceed until the costs already incurred have been paid.

BRETT, J. The plaintiff brought an action of ejectment, in which he failed, and the costs of which he was bound to pay. Another action is pending for the trial of precisely the same question which was at issue in the first action; and the defendants have made the ordinary application for a stay of the proceedings until the costs of the first action are paid. Upon such an application, I apprehend, the Court is bound to consider not only the condition of the plaintiff, but that of the defendant also. This motion, it is true, involves the payment of a very large sum of money; but it must be remembered that the defendant,—that is, the real defendant,—has already been called upon to disburse a very large sum, and will be forced, if this action goes on, to incur considerable further expense, in defending his title against a claimant who is not in a condition to pay costs.

Mr. Giffard has urged several objections against the propriety of making this rule absolute. In the first place, he insisted that the case did not come within the ordinary rule, because the parties were not the same in both actions. He did not contend that the plaintiff was not the same, or that the question in issue was not the same: but he said that the defendants in the two actions were not the same. I think he failed to make that out. The infant heir is the real defendant in both actions. But, even if that were not so, *Doe d. Brayne v. Bather* (1) is a distinct authority to shew that it is not necessary that the defendants should be identically the same. The decision is founded on the fact of the plaintiff being the same, and the defendant being subjected to costs as against a plaintiff who is unable to pay costs, and who has not paid the costs of a former action in which precisely the same question was raised.

Mr. Giffard next contended that, even though the case *prima facie* fell within the rule of practice which has been referred to, the defendants have waived their right to avail themselves of it, on the ground that they have allowed the plaintiff to take steps since the former trial. But the cases cited by Mr. Matthews seem to me to be conclusive on that point. Indeed *Harvey d. Beal v. Baker* (2) is a much stronger case than this. It was then said that the service of the notice to proceed, under s. 202 of the Common Law Procedure Act, 1852, operated as a waiver; and *Muller v. Gernon* (3) was

(1) 12 Q. B. 941. (2) 2 Dowl. (N.S.) 75. (3) 3 Taunt. 272.

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cited as an authority for that position. But there the defendant had obtained an indulgence, and then sought to defeat the condition upon which it had been granted to him. Here, however, the defendants have obtained no indulgence. The notice was served in the ordinary course, and at the proper time. It was then said that the present application is inconsistent with that notice. I do not think it is. I do not see why the two may not stand together. I see nothing inconsistent in the Court saying to the plaintiff, "You shall not proceed further with this action until you have paid the costs of the former action," notwithstanding he is bound by the notice under s. 202 to proceed to trial within twenty days, under pain of having judgment signed against him. If the amount of costs had been small, there would have been no pretence for suggesting any hardship. I therefore think Mr. Giffard has failed to shew that the defendants have waived their right to apply for this conditional stay of the proceedings.

Then he submitted that this is an application to the discretion of the Court, and that the rule upon which we are acting is not an inflexible one. *Doe d. Rees v. Thomas* (1) shews that the rule is not inflexible. I go further. If Mr. Giffard could have made out that by any act of the defendants, or any negligence on the defendants' part, the plaintiff was prejudiced to the extent of being prevented from having a fair trial upon the former occasion, although nothing approaching to fraud could be suggested, the Court ought not to interpose to prevent a second trial. But I think he failed to make this out.

Upon the whole, I see nothing of which the plaintiff has a right to complain. His counsel deliberately elected to withdraw the case from the jury, after having had ample time to consider whether or not they had any answer to give to the case brought forward on the part of the defendants. They were entitled to adopt that course; and, if I might say so, I think they exercised a very wise discretion; and the plaintiff cannot now be heard to complain that he has not had a fair trial.

I therefore see no ground for taking this case out of the ordinary rule, and think the defendants are entitled to succeed upon this motion. But there is one peculiarity in this case which I think

justifies us in somewhat modifying the rule. I refer to the large amount of costs which the plaintiff is called upon to pay, and to the fact of the defendants having served the plaintiff with a notice to proceed within twenty-one days, under s. 202 of the Common Law Procedure Act, 1852. The Court has a right to take into consideration the fact that the defendants who make this motion to stay the proceedings are the persons who gave the notice to proceed. I quite agree with my Lord, to whom all the facts are known, that the claimant is not entitled to any great sympathy on account of the largeness of the sum he is called upon to pay, seeing that the funds for the promotion of this litigation have notoriously been furnished by other people, who, unless they are firmly convinced of the justice of the plaintiff's claim, are doing terrible injustice to the infant possessor of these estates. But I think, in common justice, the plaintiff should have an opportunity afforded him to obtain the means of paying the costs, and that the time for proceeding to trial in this action should be extended, as suggested by my Lord.

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GROVE, J., concurred.

Rule absolute.

Attorneys for plaintiff: *Gorton & de Fivas.*

Attorneys for defendants: *Cullington & Slaughter.*

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Nov. 23.

TAPSCOTT AND OTHERS v. BALFOUR AND ANOTHER.

Ship and Shipping—Charterparty—Demurrage—Lay Days, commencement of
 —“Load in the usual and customary manner”—Dock Regulations.

It was agreed by charterparty between plaintiffs and defendants that the plaintiffs' ship should proceed direct to any Liverpool or Birkenhead dock, as ordered by the defendants, and there load in the usual and customary manner a cargo of coals, the vessel to be loaded at the rate of 100 tons per working day. The defendants directed that the ship should proceed to the W. Dock at Liverpool. Cargoes of coal are supplied at the docks at Liverpool through the agency of the agents for various collieries, and are most usually loaded in the W. Dock from “tips,” of which there are only two in the dock, and by the dock regulations no coal agent is permitted to have more than three vessels in the dock at a time. Though coal is generally loaded in the W. Dock from tips, it can be, and not unfrequently is, loaded from lighters. The plaintiffs' ship was ready to go into the dock on the 3rd of July, but was not allowed to enter because the coal agents employed by the defendants to supply the cargo had three vessels already in the dock, and two others in turn to go in. She was allowed to go into the dock on the 11th of July, but could not get under the tips for some time owing to the number of vessels in turn to go under them before her:—

Held, in an action for demurrage on the charterparty, that the lay days did not commence at the time when the ship was ready to enter the dock, as contended by the plaintiffs, nor at the time when she got under the tips, as contended by the defendants, but at the time when she got into the dock.

Brown v. Johnson (10 M. & W. 331) followed.

DECLARATION for that it was by a certain charterparty agreed by and between the plaintiffs and the defendants amongst other things that the plaintiffs' ship *Emerald Isle*, of 1696 tons, or thereabouts, then lying in the port of Liverpool, being tight, staunch, and strong, and every way fitted for the voyage, should with all possible dispatch proceed direct to any Liverpool or Birkenhead dock, as ordered by the defendants, and there load in the usual and customary manner a full and complete cargo of coals which the defendants bound themselves to ship not exceeding what she could reasonably stow and carry over and above her tackle, &c., and being so loaded should proceed to Valparaiso for orders to discharge at one safe port between Valparaiso and Callao both inclusive, or so near thereto as she might safely get and deliver the same in manner agreed by the said charterparty, certain perils and casualties during the said voyage excepted, freight to be paid on unloading and right delivery of the cargo at a certain

rate and in manner stipulated in the said charterparty, the vessel to be loaded by the defendants at the rate of 100 tons per working day, freighters having the option of naming the stevedore upon certain terms in the said charterparty agreed, and the cargo to be unloaded as customary at the average rate of forty tons per working day, and freighters to pay demurrage at the rate of 4*d.* per ton register per diem, except in case of riot, strike of pitmen or other unavoidable accident which might prevent the loading or delivery of the cargo—loading not to commence before the 1st of July. Averment of performance of conditions precedent. Breach: that the defendants, though not prevented by riot, &c., did not cause the said cargo to be loaded on board the said vessel according to the terms and at the date mentioned in the said charterparty.

Second count, for that in consideration that the plaintiffs would enter into and sign the charterparty in the first count mentioned, the defendants promised the plaintiffs that they would procure for the plaintiffs within a reasonable time in that behalf a certain order or certificate, to wit, an order or certificate which would enable the plaintiffs' said vessel to enter the said Liverpool or Birkenhead dock as ordered by the defendants pursuant to the charterparty, and there obtain a berth, and there load the said cargo of coal from the defendants or their agent. Averment of performance of conditions precedent. Breach: that the defendants did not, within a reasonable time in that behalf, procure for the plaintiffs an order or certificate which would enable the said vessel to enter the said dock as ordered, and there obtain a berth and load as aforesaid.

Common counts for demurrage, and money due on accounts stated.

The plaintiffs' particulars of demand claimed the sum of 593*l.* 12*s.* for twenty-one days' demurrage of the *Emerald Isle*, at 4*d.* per ton register, as per charterparty.

Pleas to first and second counts, denial of the promise, and the breach. To the residue of the declaration, never indebted, and set-off.

Issues.

At the trial, which took place in the Passage Court of Liver-

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pool before the assessor, the following facts were proved or admitted by the parties:—

The defendants entered into the charterparty, the terms of which are set out in the declaration, with the plaintiffs for the charter of the plaintiffs' ship, *Emerald Isle*. The defendants ordered the vessel to proceed to the Wellington Dock, at Liverpool, to load. On the 3rd of July, the vessel was ready to go into the dock.

It appeared that the most usual mode of loading coal in the Wellington Dock, is by means of "tips" or "spouts," of which there are two in the dock, and by the dock regulations, no ship is allowed to go into the dock without an order from a coal agent, and no coal agent is allowed to have more than three vessels in the dock at one time. The defendants' coal agents for the purpose of loading the *Emerald Isle* at the dock, were Messrs. Branckner & Co. An order to admit the *Emerald Isle* to the dock was given by Mr. Morgan, Messrs. Branckner & Co.'s agent, on the 29th of June, but the ship was not permitted to go into the dock until the 11th of July, on account of Messrs Branckner and Co. having already three vessels in the dock, and two more upon the dock books for admittance before the *Emerald Isle*. On the 11th of July the *Emerald Isle* was permitted to go into the dock, but was not permitted to go under the "spout" or "tip" until the 29th of July. She could not have commenced loading from the tips before the 23rd of July, as other vessels were being loaded, five of them being the vessels of Messrs. Branckner & Co. On the 23rd of July her turn arrived to go under the tips, but from that date to the 29th, she was not under the tips, as Messrs. Branckner & Co. had no coal for her. Other vessels, some of them being Messrs. Branckner's, booked after the 3rd of July, were put under the tips before the 29th of July.

From the 29th of July to the 7th of August, coals were loaded on board the ship, and it was admitted that her cargo might have been completed on the 8th; but if she had waited in the dock till that day, she would have been neaped, i.e., the state of the tides would have prevented her getting out of the dock for some time, and the captain therefore had her taken out of the dock and removed to a Birkenhead dock, where her loading was continued

from lighters, and completed by the 15th of August. It appeared that though the most usual method of loading in the Wellington Dock was from the tips, the loading could be and was not unfrequently done from lighters.

On these facts the verdict was entered for the defendants, leave being reserved to the plaintiffs to move the Court of Common Pleas to enter the verdict for the plaintiffs for such sum as the Court should think fit, upon the ground that there was evidence of the defendants' liability; the Court to have power to draw inferences of fact.

A rule nisi was accordingly obtained.

Holker, Q.C., and *Gully*, shewed cause. The question whether demurrage is due, and if so, how much, depends on the question when the time for loading began. The plaintiffs' contention is that it began on the 3rd of July, when the ship was ready to go into the dock; the defendants contend that it did not begin until the 23rd of July. In the latter case, the loading was complete within the proper time, and no demurrage became due. It will be contended that there was an implied promise to give an order to enable the ship to go into the dock and load as soon as she was ready to do so. It is submitted that no such promise can be implied. The only implied promise there could be, would be to give an order to enable her to go into dock within a reasonable time. The question what would be a reasonable time must depend on all the circumstances of the case. There is no finding of the jury here that the time was unreasonable; the order was given which enabled the plaintiffs' ship to enter the dock in the usual manner, according to the regulations in force. The fact that the ship was prevented from entering the dock until the 11th of July, did not arise from any fault of the defendants, but from the crowded state of the dock. The same considerations apply to the delay in the dock: the charterparty says that the ship is to load in the usual and customary manner. The usual manner of loading in the dock is from tips, and the practice is and must be, that vessels have to wait their turn at the tips. It is perfectly well known what the practice as to loading coal in the Liverpool docks is: that the coals are supplied by a limited number of agents for the Lancashire

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collieries, and that the number of tips being limited, there are regulations as to the order of loading. The charterparty must be construed with reference to the well-known course of business. There is no proof here that the time which elapsed was unreasonable.

With respect to the period subsequent to the ship's leaving the dock, the plaintiffs cannot recover. She might have been completely loaded by the 8th of August, but for the act of the captain in so removing her from the dock. It was unfortunate for the ship-owner that the state of the tides was as it happened to be, but he cannot throw the consequences of that on the charterers. [They cited *Leidemann v. Schultz*. (1)]

Herschell, Q.C., and *Myburgh*, supported the rule. It is contended that upon the true construction of the charterparty there is a contract to give the plaintiffs an order for some dock, into which the ship can get when she is ready to load. It is said that the defendants could not do so, because the coal agents had already three vessels in the docks. The answer is, that this results from employing a particular coal agent. It was admitted that other vessels, booked after the plaintiffs', got loaded before her. It is unreasonable that the plaintiffs' vessel should have to wait, because the defendants choose to employ a particular agent, who happens to have a great many ships in turn for loading before plaintiffs'. The duties of both sides under the charterparty must be correlative. The vessel is to proceed at once to the dock: it must be the defendants' duty to get her loaded when ready. If this view be correct, the lay days commenced on the 3rd of July.

[DENMAN, J. You must admit that it was for the charterer to select the coal agent. Can you put it higher than that he must not make an unreasonable choice? Then what evidence is there that he did so here?]

It lies on him to shew that he could not have enabled us to load sooner by choosing some other agent.

[BOVILL, C.J. The reasonableness of the choice does not depend on the state of things when the vessel arrives. The charterer must give his orders beforehand in the ordinary course of business. How could he know that the agent would have three vessels in the dock at the time?]

But if a loss is to arise from circumstances of this nature, is it not more reasonable that the charterer who selects his own agent for his own purposes should bear it, than the shipowner, who has nothing to do with the agent?

Secondly, it is contended that in any case the lay days commenced on the 11th of July, the day of the ship's getting³² into the dock. The case of *Brown v. Johnson* (1) is conclusive in the plaintiff's favour on this point. It was there held that the lay days commenced from the time of the vessel's getting into the dock, though from the crowded state of the dock she did not get to the place of unloading till later. The Court held that the lay days commenced when the vessel had reached its usual place of discharge, which was the dock, and not any particular place in the dock.

The words "load in the usual and customary manner" cannot have the construction contended for by the defendants. They are part of the ordinary printed form of any charterparty, and cannot be construed as meaning that the lay days are only to commence when the vessel is under the tips. Calculated in this way, the demurrage would commence on the 3rd of August, when the loading at the rate of 100 tons a day would have been complete if commenced on the 11th. Then with reference to the time to which it is to extend, it is submitted that it must extend to the 15th of August. The removal of the ship from the dock was not the independent act of the captain alone. The fair construction of the facts and correspondence is, that she was moved from the dock by arrangement for the benefit of both parties. If she had been neaped in the dock by reason of defendants' breach of contract, the damages would have been very much increased. Therefore, if the loading ought to have been complete by the 7th, the defendants are liable for this demurrage also. [The Court intimated their opinion that the fair inference from the facts before them was that the removal of the ship from the dock had been by arrangement for both parties' benefit, and the defendants' counsel admitted that this must be taken to be so.]

[They also cited *Kell v. Anderson* (2); *Parker v. Winlow* (3);

(1) 10 M. & W. 331.

(2) 10 M. & W. 498.

(3) 7 F. & B. 942; 27 L. J. (Q.B.) 49.

1872 *Brereton v. Chapman* (1); *Lawson v. Burness* (2); *Robertson v. Jackson*. (3)]

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BOVILL, C.J. The questions which we have to decide in this case turn principally on the construction to be placed on the words of the charterparty. It is provided that the vessel "shall with all possible dispatch proceed direct to any Liverpool or Birkenhead dock as ordered by charterers, and there load in the usual and customary manner a full and complete cargo of coals which they bind themselves to ship . . . The vessel to be loaded at the rate of 100 tons per working day."

The question arises when these working days were to commence. There is no express stipulation in the charter as to the time when the loading was to begin, and we must therefore consider what is the ordinary rule on the subject. The rule is, that when a port is named in the charterparty as the port to which the vessel is to proceed, the lay days do not commence upon the arrival of the vessel in the port, but upon her arrival at the usual place of loading in the port, not the actual berth at which she loads, but the dock or roadstead where loading usually takes place. If, when she arrives there, the place is so crowded that she cannot load, the loss must fall on the charterer; the shipowner has done all he was required to do when he has taken his vessel to the usual place of loading in the port. Now, by this charterparty, the vessel was to proceed to any Liverpool or Birkenhead dock as ordered by the charterers. The charterers were to have the selection of the dock, and they accordingly selected the Wellington Dock. It seems to me that the effect of such selection was precisely as if that dock had been expressly named in the charterparty originally, and the agreement had been that the vessel should proceed direct to the Wellington Dock, and when there should load in the usual and customary manner. Now, great stress was laid on the words "in the usual and customary manner." These words are, however, only part of the ordinary printed form of charterparty, and must be taken, I think, to apply to the mode of loading, and not to the place to which the shipowner undertakes that the ship shall

(1) 7 Bing. 559.

(2) 1 H. & C. 396.

(3) 2 C. B. 412; 15 L. J. (C.P.) 28.

proceed. The meaning of these words is referred to in the case of *Lawson v. Burness* (1) by Pollock, C.B., who says: "It appears to me the words 'customary manner' mean the mode of loading, whether by a lighter or at the wharf."

It would be giving such an expression a very extended construction to say that it applies to the place to which the shipowner undertakes the vessel shall proceed so as to increase his liability to the extent here contended for. The cases which may seem at first sight to bear out the argument of defendant's counsel are, it seems to me, distinguishable. In each of them there was an express stipulation as to the loading, and not merely the ordinary expression "load in the usual and customary manner." In the case of *Robertson v. Jackson* (2) the stipulation was, that the time should run from the time of the vessel being ready to unload and in time to deliver. All turned on those express words. So in *Leidemann v. Schultz* (3) the vessel was to proceed forthwith to Newcastle-on-Tyne, and there be ready forthwith "in regular turns of loading" to take cargo; and in *Lawson v. Burness* (4) similar expressions were used.

All these cases depended on the express terms of the charter. In the present case, there being no express provision on the subject, the ordinary rule must prevail; and treating the charter, as I have before said it must be treated, viz. as though it provided that the ship should proceed direct to the Wellington Dock, then any loss arising from the state of the dock must fall, according to the authorities, on the charterer, and not on the shipowner. On the other hand, if that view be correct the lay days did not commence till the vessel got into the Wellington Dock. The charterparty gives the right of selecting one of several docks to the charterer, and the parties must be taken to have known the regulations affecting such dock. If by such regulations access to the dock might be delayed, the loss must fall on the shipowner, the charterer having the option of naming such dock. This case is not unlike that of *Kell v. Anderson*. (5) There the ship was kept ten days at Gravesend because she was entered by the freighters for a meter, and conse-

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(1) 1 H. & C. at p. 400.

(3) 14 C. B. 38; 23 L. J. (C.P.) 17.

(2) 2 C. B. 412; 15 L. J. (C.P.) 28.

(4) 1 H. & C. 396.

(5) 10 M. & W. 498.

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quently was detained by the harbour master, and not allowed to go up into the Pool till her turn arrived for a meter. It was held that the loss must be sustained by the shipowner. Mr. Herschell urged that, though the charterer might have a right to select a particular dock, he had no right to select a particular agent to load the ship. But who is to determine what agent is to be employed? We must take it that it was the usual course for vessels to be loaded through an agent, and that there was nothing unreasonable or exceptional in the course pursued in this respect.

In *Leidemann v. Schultz* (1) the argument was employed that the ship might have loaded at a different spout. Counsel said in arguing: "The case shews that the defendants could have loaded the ship earlier had the ship been allowed to go to another spout;" but the Lord Chief Justice answers: "Yes, but with different coke, and at a higher price; if the captain may choose at what spout he will load, he may next choose what articles he will load with. It was not left to the jury to say whether the charterer had sent the ship improperly to an incumbered spout." So here, I say, if it were intended to rely on anything unreasonable and improper in the selection of the agent, the defendants' counsel should have insisted on that question being left to the jury, but no such question having been submitted to them, and it being the usual course to employ an agent, we must now assume that there was nothing unreasonable and improper in the selection that was made.

This disposes of the claim for demurrage so far as it depends on the contention that the lay days commenced on the 3rd of July, and leaves it to depend on the contention that they commenced on the arrival of the ship in the dock on the 11th. I am of opinion that the lay days did commence on the 11th, and that the charterers' responsibility therefore dates from that time. A subordinate question was raised whether such responsibility continued during the time occupied by the vessel's going to a Birkenhead dock and completing her loading there. Of course if this had been done for the shipowner's convenience only he could make no claim in respect of the time so occupied, but it appears to me, looking to the circumstances of the case and the correspondence between the parties, that the proper inference to draw is that this course was

adopted by mutual consent to avoid more serious loss. I am, therefore, of opinion that the verdict must stand for the whole amount of demurrage calculated from the time when the loading ought to have been complete if commenced from the time of the vessel's going into dock to the completion of her loading; that is to say, twelve days' demurrage amounting to 329*l.* 4*s.*

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DENMAN, J. I am of the same opinion. I think the question, when fully considered, turns chiefly on the construction of the charterparty. It seems to me on the true construction of that instrument that on the day when the ship arrived in the dock the shipowner had done all that he was bound to do. At first I doubted whether the words "usual and customary manner" might not have a larger signification than upon further consideration I am disposed to give them. The ship is to proceed direct to any Liverpool or Birkenhead dock as ordered by the charterers. That stipulation is fulfilled directly the ship arrived in the Wellington Dock. She is then to load in the usual and customary manner. It is argued that those words import the consideration that the loading can only be done at a particular spot in the dock, and that there can be no liability for demurrage till the vessel reaches that spot. I do not think the evidence supported that view. There was evidence that the loading was not unusually effected, not from the spout, but from lighters. It would, I think, be well within the terms of this charter if the loading had so taken place. If this be so, it is impossible to say that the words "usual and customary manner" are equivalent to a provision that demurrage shall not begin till the vessel has arrived at a particular spout. With respect to the period up to which the demurrage must be calculated, I agree with my Lord.

Rule absolute.

Attorney for plaintiffs: *Wynne, for Forshaw & Hawkins.*

Attorneys for defendants: *Chester, Urquhart, Bushby, & Mayhew, for Norris.*

1872
Nov. 28.

[IN THE EXCHEQUER CHAMBER.]

JEWSBURY v. MUMMERY.

Executor—Plene Administravit—Judgment of Assets—Devastavit—Assent of Creditors to misapplication of Assets—Estoppel.

In an action against an executor a plea of plene administravit was pleaded, and the action having been referred, the arbitrator found against the defendant upon the plea, and the plaintiff accordingly signed judgment. The plaintiff afterwards brought his action upon the judgment against the defendant, suggesting a devastavit. The defendant sought to set up, by way of defence, facts which tended to shew that, though assets had come to his hands before the judgment, and had been illegally appropriated, such misappropriation had taken place with the consent and concurrence of the plaintiff, and that he was therefore estopped from complaining of it:—

Held (affirming the decision of the Court below), that if the facts which the defendant sought to set up amounted to a defence, they might have been rendered available under the plea of plene administravit, and the defendant could not, therefore, set them up as negating the devastavit.

APPEAL from the decision of the Court of Common Pleas, discharging a rule calling on the plaintiff to shew cause why the verdict should not be entered for the defendant, or why a special case should not be stated between the parties, pursuant to leave reserved.

Declaration by the plaintiff, as the public officer of the Gloucestershire Banking Company, stated that a judgment had been recovered by the plaintiff, as such public officer, in the Court of Common Pleas against the defendant, as executor of William Shackleford, deceased, for the sum of 2374*l.*, to be levied of the goods and chattels of the testator in the hands of the defendant, which judgment remained unsatisfied, and suggested a devastavit by the defendant of the goods of the testator, which at the time of the judgment had come to the defendant's hands.

Pleas: 1. Not guilty; 2. For a defence on equitable grounds that the said acts complained of in the declaration were committed by the defendant with the full knowledge, approbation, privity, and concurrence and leave of the said banking company, and that the said company acted as the agents of the defendant in committing the same, wherefore the defendant says that the plaintiff ought not to be admitted to aver that the defendant elogned, wasted, con-

verted, and disposed of the said goods: 3. The Statute of Limitations.

Issues thereon.

The trial took place before Willes, J., at the sittings after Michaelmas Term, 1870, in London. The plaintiff put in the judgment roll in the former action between the same parties. It appeared by the roll that this action was by the plaintiff, as public officer of the banking company, against the defendant, as such executor as aforesaid, for breach of a covenant made by the defendant's testator for repayment to the banking company of certain sums advanced by the company to the testator upon demand and for keeping up the payment of the premiums on certain policies of insurance. To this action the defendant pleaded, *inter alia*, a plea of *plene administravit*. It further appeared that the action had been referred by judge's order to an arbitrator, who found all the issues for the plaintiff; and also that a sum of 2374*l.* was due to him, as the public officer of the banking company, from testator's estate, and that the defendant, at the time of the commencement of the said action, and since, had assets of the testator in his hands to be administered to the value of the said sum of 2374*l.*, wherewith the defendant might have satisfied the plaintiff in such amount.

The plaintiff also put in the writs of *fi. fa.* issued to the sheriffs of Middlesex and Gloucestershire against the goods of the testator, and the return of *nulla bona* to such writs.

The defendant proposed to give evidence relating to the testator's estate, and the administration thereof, at a time previous to the said former action and judgment roll, to shew the nature of the evidence on which the arbitrator to whom the said action was referred had made his award; and in particular he proposed to shew that it had appeared before the said arbitrator that a banking account had been opened by the executors of the testator, of whom the defendant was the survivor, with the Gloucestershire Banking Company, to which account the company transferred a certain sum of money, the residue, after discharging the balance due from the testator on his current account, of the produce of a certain policy of assurance, by which the said current account was secured, that sums of money had been paid into the said account to an amount

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exceeding the whole amount of the debt remaining due to the said company from the testator's estate, and that the said company had permitted the whole amount so paid in to be drawn out by cheques more than six years before this action, instead of applying the same to the payment of the testator's debt. That some of the said cheques appeared by their form to be payments on account of other than specialty debts, and, further, that the defendant had not in his actual possession any assets of the testator within six years before this action; but the learned judge held that the defendant was estopped by the judgment from denying that he had, at the date thereof, assets in his hands of the testator, out of which he might have satisfied the plaintiff's debt, and that the proposed evidence could not be given.

The verdict was entered by agreement for the plaintiff, leave being reserved to the defendant to move to enter the verdict for him on the understanding that the Court was to deal first with the question of estoppel, and that if the Court should hold that the defendant was not estopped from giving the proposed evidence, then the facts should be stated in the form of a special case. A rule nisi was accordingly obtained to shew cause why the verdict should not be entered for the defendant, or why a special case should not be stated between the parties, on the ground that the defendant was misled by the conduct of the plaintiff in the distribution of the assets, and the plaintiff was thereby precluded from complaining of the insufficiency of assets, and that the defendant was at liberty to shew, and did shew, of what the devastavit complained of consisted, and that it was barred by the Statute of Limitations, and was not estopped from so doing by the judgment against him.

This rule was discharged by the Court of Common Pleas, against whose decision the defendant appealed.

Giffard, Q.C. (*W. G. Harrison* with him), for the defendant, the appellant. The defendant now seeks to shew that there has been no devastavit as against the plaintiff; that the acts which are alleged to amount to one consisted of the application of assets to simple contract debts, and that such application took place with the consent and concurrence of the banking company, and the

defendant was thereby misled in the distribution of the assets; and therefore the plaintiff, as representing the company, is estopped from complaining of it.

[KELLY, C.B. Ought not the defendant to have availed himself of this defence under the plea of plene administravit?

BRAMWELL, B. You seek to say that the defendant did not waste the assets after the judgment, because he wasted them before, with the plaintiff's consent?]

It is contended that the defendant could not have availed himself of this defence under the plea of plene administravit. The former action is not against the defendant in his personal capacity, but merely as representing the estate of the testator, and the only question on the plea of plene administravit is, whether there were assets, and whether they have been legally appropriated. It is only when the plaintiff proceeds against the executor in his personal capacity, and complains of a misappropriation of assets, that the executor can shew, in answer, that though there were assets, and there was such a misappropriation, the plaintiff is estopped from taking advantage of it because he consented to it. The equity out of which the estoppel arises attaches to defendant in his personal capacity only.

[BLACKBURN, J. It seems to me that, if there be an estoppel now, there was equally one under the plea of plene administravit.]

[He cited notes to *Wheatley v. Lane* (1); *Mara v. Quin*. (2)]

Anstie, for the plaintiff, the respondent, was not called upon.

KELLY, C.B. I am of opinion that the judgment of the Court of Common Pleas should be affirmed. In this case the plaintiff commenced an action against the defendant as executor to recover the amount of the debt, and to this action there was a plea of plene administravit. The issue on that plea was found for the plaintiff. The plaintiff then proceeds upon the judgment, suggesting a devastavit, and the defence now sought to be set up is that, although before the judgment assets had come to the hands of the executor, and were not legally appropriated to the payment of debts, such misappropriation took place with the consent, or perhaps even at the instance of the plaintiff; and consequently,

(1) 1 Wms. Saund. 219 c, 219 d.

(2) 6 T. R. 1.

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with respect to the moneys so appropriated, there is nothing which he can now rely upon as a devastavit. The question arises whether the facts now offered in evidence to negative the devastavit could not have been offered in evidence before the arbitrator on the plea of plene administravit, and if they could, whether they are not now inadmissible. Now, it seems to me that, if these facts amount to an answer to the suggestion of a devastavit, it is because they shew that as against the plaintiff this money must be treated as having been legally appropriated; and the same defence, based upon the very same facts, might have been raised upon the plea of plene administravit. If the defendant could have shewn before the arbitrator that, though assets had come to his hands, he had parted with them under circumstances which precluded the plaintiff from alleging that they had not been duly administered, clearly that would have been a defence under the plea of plene administravit. Therefore one of two things must have been the case; either the evidence upon which the defendant now seeks to rely was not offered before the arbitrator upon the plea of plene administravit, and then the issue on that plea was rightly found against the defendant; or if offered, the arbitrator must have considered that the facts proved did not amount, as against the plaintiff, to a due administration of the assets that had come to the defendant's hands. If they had amounted to such an administration, the defendant would clearly have been entitled to have the issue found for him.

If it be the case that the defence now sought to be set up would have been available under the plea of plene administravit, it is clear, upon the general principles of law, that the defendant, having omitted to set it up when he might have done so, cannot now avail himself of it. It would go to negative the correctness of the judgment that the plaintiff has obtained in the former action, and to shew that he was not entitled to succeed upon the plea of plene administravit. It appears to me that there canno be any substantial doubt that the defendant is estopped from setting up any such defence.

BRAMWELL, B., concurred.

CHANNELL, B. I am of the same opinion. The facts of the

case are short and simple, and there does not seem to me to be much difficulty in arriving at a conclusion upon the point raised before us. In the former action there was a plea of plene administravit, upon which issue was joined. It was clear that assets had come to the defendant's hands as executor, and the question was whether he had fully administered them. These sums of money were, no doubt, not properly appropriated, because they were applied to simple contract debts while there were specialty debts outstanding. Now, if the defendant could rely upon the fact that such misappropriation took place at the plaintiff's request, or under circumstances in which the plaintiff had misled the defendant into so applying them, it is clear that this would go to shew that these sums of money were not, as between the plaintiff and the defendant, assets in the hands of the defendant. It is impossible, it appears to me, to contend that these facts, if a defence, could not have been set up under the plea of plene administravit. That being so, it appears to me that the defendant cannot now set them up under a traverse of the devastavit.

BLACKBURN, J. I am of the same opinion. It cannot, I think, be contended that, if the defendant had an opportunity of relying upon these facts as a defence in the former action, he can now, having let such opportunity go by, set them up as a defence as negating a devastavit. The rule of equity was held to be in this respect the same as that of law as long ago as Lord Hardwicke's time, in the case of *Ramsden v. Jackson*. (1) The simple question, therefore, is whether the defendant could have made use of these facts as a defence in the former action. It is clear that moneys forming part of the testator's estate came to the defendant's hands, and that the application of them was *primâ facie* illegal as against the plaintiff; but the defendant seeks to shew, as a defence, that such misapplication was with the plaintiff's own consent. It appears to me that, if the facts the defendant now seeks to set up amount to a defence, he could have availed himself of it under the plea of plene administravit. In the case of *Cooper v. Taylor* (2) Maule, J., distinctly held that the question under the plea of plene administravit is whether there are assets in the hands of the exe-

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(1) 1 Atk. 292.

(2) 6 M. & G. 989.

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cutor available for payment of plaintiff's debt. So also, in *Richards v. Browne* (1), Tindal, C.J., expressly lays it down that, if in the distribution of assets a creditor misleads an executor, either by laches or by express authority, so as thereby to induce the executor to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets. It is clear, therefore, that the defence now relied upon might have been set up before the arbitrator. That being so, it is immaterial whether it was in fact set up or not.

CLEASBY, B. I am of the same opinion. What the declaration complains of is a wasting of assets after the judgment, whereas the defence is directed to acts which took place before.

ARCHIBALD, J. I am also of opinion that this judgment must be affirmed. It seems to me clear, on the authority of *Richards v. Browne* (1), that the defence sought to be set up might have been set up under the plea of plene administravit; and the issue on that plea having been found against the defendant, he is now precluded from setting it up.

Decision affirmed.

Attorney for plaintiff: *Tattam*.

Attorneys for defendant: *Stevens, Wilkinson, & Harries*.

Ex parte CHRISTOPHER BRIGGS.

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Court of Common Pleas at Lancaster—Practice—Striking Attorney off the Roll.

Nov. 9.

This Court has by virtue of its general jurisdiction power to strike an attorney off the roll of the Court of Common Pleas at Lancaster.

A fortiori, where one of its judges is pro tem. Chief Justice of that Court.

L. TEMPLE, Q.C., moved to strike the name of Mr. Briggs off the roll of attorneys of this Court and also of the Court of Common Pleas at Lancaster, at his own request, upon the usual affidavit. A similar application had been made to the Court of Queen's Bench; but, although Blackburn, J., was of opinion that that Court had the power, the Lord Chief Justice, referring to 32 & 33 Vict. c. 37 (1), thought it would be better that the application should be made to this Court, so far as it related to the Court of Common Pleas at Lancaster, Brett, J., being pro tem. Chief Justice of that Court.

BOVILL, C.J. I do not entertain any doubt that this Court has authority to grant this application. The rule may go.

BRETT, J. As far as the exercise of my authority (which, however, does not rest upon the statute referred to,) is necessary, I concur in granting the rule.

The rest of the Court concurring,

Rule absolute.

Attorneys for applicant: *Chester & Urquhart.*

(1) 32 & 33 Vict. c. 37, s. 6, authorizes the Chancellor of the Duchy to make rules for, amongst other things, empowering the prothonotary or district prothonotary to transact all such business as is now transacted by the judges of the superior Courts at chambers. And by s. 7 the matters

referred to may be heard and determined by any of the superior Courts at Westminster, either sitting in banco, or by any one of the judges of the said Courts at chambers, where according to the practice of such Court such matters would be heard by a single judge at chambers.

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Nov. 25.

SMALE v. BURR.

*Bill of Sale—Cancellation—Substitution—Registration—Stat. 13 Eliz. c. 5—
17 & 18 Vict. c. 36.*

8Ch 648
9QB20
22-3-6
27-30-1
33a
208g 707
5Ch D. 563
6Ch D. 186
7Ch D. 142

In June, 1871, P. assigned furniture and stock-in-trade to S. by an absolute bill of sale, as security for an advance of 20*l*. This bill of sale was not registered, but, before the expiration of the twenty-one days allowed by 17 & 18 Vict. c. 36 for registration, a second bill of sale was substituted for it; and the same operation was from time to time repeated down to the 15th of July, 1872, P. continuing all the time in possession and dealing with the goods as his own, and the 20*l*. being still a subsisting debt. The last bill of sale (which alone was stamped, and the consideration for which was stated to be a present advance of 20*l*.) was duly registered on the 1st of August, 1872:—

Held, that the bill of sale so registered was available against the claim of an execution-creditor of P., that there was a sufficient consideration for it, and that it was not avoided by 13 Eliz. c. 5.

On the 2nd of October, 1872, certain stock-in-trade and furniture were seized under an execution at the suit of the now defendant upon a judgment obtained by him against one Joseph Price, trading under the name of Alfred Twiss. The goods were claimed by the present plaintiff under a bill of sale; and a portion of them was also claimed by one Agnes Twiss, the sister-in-law of Price, as being her property. Upon an interpleader summons, an issue was directed by a master as between the now plaintiff and the execution-creditor; the claim of Agnes Twiss being barred.

The issue was tried before Byles, J., at the last sitting at Westminster in this term. The facts proved were as follows:—The bill of sale under which the plaintiff claimed, and which purported to be an absolute assignment of the goods in question to him by Price and Agnes Twiss in consideration of an advance of 20*l*. by the plaintiff to Price “on or about the day of the execution” of the instrument, bore date the 15th of July, 1872, and was registered on the 1st of August; and on it was indorsed a receipt for 20*l*., signed by the plaintiff and dated the 15th of July, 1872. No such sum was in fact advanced by the plaintiff on that day: but, in June, 1871, the plaintiff did lend Price 20*l*., as a security for which a bill of sale was given in the same form as the bill of sale in question. The security was renewed from time to time, about

Followed in Ramsden v. Luxton L.R. 9 QB 17

fifteen or sixteen bills of sale having been executed between June, 1871, and the 15th of July, 1872, all in the same form, none of them being stamped or registered, and Price continuing all the time in possession of the goods, and carrying on his trade as before.

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It was contended on the part of the defendant that the consideration for the bill of sale of the 15th of July, 1872, was untrue; that, the property in the goods having passed out of Price by the first bill of sale in June, 1871, there was nothing upon which the last could operate; and that the transaction was fraudulent and void by the statute of 13 Eliz. c. 5.

The learned judge ruled that the misstatement as to the consideration was immaterial, that the property in the goods had not passed from Price by the first bill of sale, that the statute of Elizabeth was only material in case of bankruptcy, and that the only question for the jury was whether or not the last bill of sale was *bonâ fide*. The jury found for the defendant. *Haintiff*

McIntyre, Q.C. (F. M. Wetherfield with him), moved for a new trial on the ground of misdirection. The system of renewing bills of sale before the expiration of the time allowed by 17 & 18 Vict. c. 36 for registration, is resorted to by the lender for the purpose of defeating creditors.

[BOVILL, C.J. And protecting himself.]

The original bill of sale having passed the property in the goods from the grantor and vested it in the grantee, there could be no valid consideration for the one which was ultimately registered.

[BOVILL, C.J. If you rely upon the former bills of sale, not for a collateral purpose, but as evidence of an assignment, you are met by the difficulty that they are unstamped. There are at least two cases which are against you.]

Not exactly. In *Hollingsworth v. White* (1), the bill of sale first executed by Phillips, the grantor, contained a proviso for redemption if the sum advanced was paid on a given day or on any further or extended day to be agreed upon; and Cockburn, C.J., said: "It is true that the property in these goods passed from Phillips at the time he executed the [first] bill of sale: but the execution of the

(1) 6 L. T. (N.S.) 604.

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other bills was but an exercise of the right of redemption, whereby he redeemed the goods and granted a fresh security." Here, however, the first bill of sale was an absolute assignment of the property.

[BRETT, J. Did not the substitution of the second and subsequent bills of sale here amount to the same thing?]

Then, the consideration for the last bill of sale was untruly stated. It was admitted that there had been no advance of 20*l.* by Smale to Price "on or about the day of the execution" of that instrument.

[GROVE, J. Subject to the difficulty as to the date, there was in point of fact the consideration stated.]

The giving of the successive bills of sale, and allowing the grantor to retain possession of the goods and to deal with them as his own in a manner inconsistent with the bill of sale, was evidence of fraud, which ought to have been submitted to the jury. In *Edwards v. Harben* (1), it was held that, if a creditor take an absolute bill of sale of the goods of his debtor, but agree to leave them in his possession for a limited time, and in the meantime the debtor die, whereupon the creditor takes and sells the goods; he will be liable to be sued as executor de son tort for the debts of the deceased; for, the debtor's continuing in possession is inconsistent with the deed, and fraudulent as against creditors. In giving judgment, Buller, J., said (2): "Here, the bill of sale was upon the face of it absolute, and to take place immediately, and the possession was not delivered; and the case of *Bamford v. Baron* (3) makes a distinction between deeds or bills of sale which are to take place immediately and those which are to take place at some future time. For, in the latter case, the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed, and such possession comes within the rule, as accompanying and following the deed. That case has been universally followed by all the cases since."

BOVILL, C.J. I regret that we are obliged by our judgment to sanction a practice so detrimental to the interests of the revenue and so calculated to defeat and delay creditors. But the principles

(1) 2 T. R. 587.

(2) 2 T. R. at p. 596.

(3) 2 T. R. 594, n.

upon which the Courts have acted in these cases compel us to refuse this rule. No doubt, the first bill of sale would be perfectly valid as between the parties, and would be wholly unaffected by the absence of registration. The want of a stamp would only go to its admissibility. Then, what was the effect of the substitution of the second bill of sale for the first? It seems to me that it amounted to a cancellation of the previous bill of sale, at all events as between the parties themselves. It is true that the Court in *Hollingsworth v. White* (1) said that the execution of the subsequent bills of sale was but the exercise of a right of redemption: but, in substance, they treat the execution of the second bill of sale as a virtual cancellation of the first, and the execution of the third as a cancellation of the second, leaving the last good as against the execution-creditor; for, Cockburn, C.J., in giving judgment, says: "There was a virtual annulling of the first and second bills of sale, whereupon a third good and valid bill of sale was executed, which, according to *Marples v. Hartley* (2), was good as against the execution-creditor, although not filed when the goods were seized." The principle of that decision is applicable here. If each of the subsequent bills of sale be held to annul the previous one, the result is that the original consideration is sufficient to sustain the last. As between the parties, therefore, the property passed under the last bill of sale; and, the requirements of the statute as to registration having been observed, the last bill of sale became good also as against the execution-creditor. It seems to me that my Brother Byles was quite right, and that there should be no rule. In addition to *Hollingsworth v. White* (1), I would refer to *Edwards v. English* (3), which is very much to the same effect. There, a bill of sale of goods was bonâ fide made by J. H. to F. H. by way of security, and was filed, but with an affidavit which turned out to be defective; and a subsequent bill of sale of the same goods, subject to that to F. H., was bonâ fide made by J. H. to E. by way of security, and was properly filed: and upon an interpleader issue it was held that the goods were not seizable by the sheriff against E. And Crompton, J., said: "It is impossible to put the construction upon the Act, that the existence of

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(1) 6 L. T. (N.S.) 604.

(2) 3 E. & E. 610; 30 L. J. (Q.B.) 92.

(3) 7 E. & B. 564; 26 L. J. (Q.B.) 193.

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a prior bill of sale, bad against an execution-creditor because not registered, has the effect of defeating all subsequent bills of sale though properly registered." Here, the execution-creditor for some purposes wishes to treat the first bill of sale as a void transaction as against him; but, at the same time, in order to impeach the last bill of sale, he seeks to set up the first as a valid assignment of the goods by the debtor. The difficulty of so dealing with the matter has already been pointed out. Upon the whole, I think the correct conclusion has been arrived at, and that there should be no rule.

BRETT, J. In this case the defendant took in execution the goods of one Price. The plaintiff claimed them under a bill of sale given to him by Price on the 15th of July, 1871, and duly registered under the statute. If in other respects valid, it is conceded that that bill of sale was good as against the execution-creditor, unless it is avoided for one of two reasons,—first, that it was given without consideration; secondly, that it was given with intent to defraud Price's creditors. It appears that it was given as a final bill of sale, after a series of fifteen or sixteen, each being intended to secure an original loan of 20*l*. My Brother Byles was asked to tell the jury that there was no consideration for the last bill of sale, and that it was void under the statute 13 Eliz. c. 5. Authority is not wanting to shew the real meaning of these transactions. The first bill of sale was not registered. Another was given in substitution for it. *Hollingsworth v. White* (1) shews that that amounted to a cancellation or annulling of the first. The 20*l*. however, still remained a debt, and the goods continued in the possession of the grantor. Although, therefore, the property might have passed by the first bill of sale, yet, if the parties chose to annul it, the property in the goods would pass back to the grantor, and the debt still existing, it became, upon the construction put upon the statute by *Hollingsworth v. White* (1), a good consideration for the second bill of sale: and so of the rest. Then, was the learned judge right upon the question of fraud? He was asked to tell the jury that the last bill of sale was fraudulent and void as against the execution-creditor. He declined to do this,

(1) 6 L. T. (N.S.) 604.

but left it to the jury to say whether there was fraud as between the plaintiff and Price, that is, whether as between the plaintiff and Price it was bonâ fide intended that the property in the goods should pass by the bill of sale. That clearly was the proper and only question to leave to them. If the property was intended to pass to the plaintiff by the bill of sale, there was no fraud; for, fraud as against creditors generally, or as against the execution-creditor (there being no bankruptcy), was immaterial. Upon no other ground could it be contended that the bill of sale was void. The ruling and the verdict were therefore right.

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GROVE, J. I come with great reluctance to the same conclusion. I have tried, but in vain, to find some ground for impeaching a transaction which I feel to be a fraud upon the statute. Twenty-one days are given to the grantee to register a bill of sale: and this indulgence is taken advantage of to evade the object of the statute. A friendly creditor lends money to a needy person, taking by way of security a floating paper which may or may not be registered as a bill of sale, but which is renewed from time to time before the expiration of each period of twenty-one days by substituting a fresh one; and the creditor, by causing the last to be registered, not only defrauds the revenue, but also defeats the object of the statute, which was the protection of persons who might be dealing with the grantor upon the faith of his apparent ownership of the goods. The transaction certainly is one which is much to be deprecated: but I can find in law no answer to the plaintiff's claim. The last bill of sale having been duly registered, it operated as a valid transfer, and was good as against the execution-creditor.

DENMAN, J. I am of the same opinion. I should have been extremely glad if I could have found an authority which would have enabled us to defeat this bill of sale. But I find none.

Rule refused.

Attorney for defendant: *J. Wetherfield.*

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LEA v. WHITAKER.

Nov. 29.

Agreement for the Sale of a Public-house—Penalty or Liquidated Damages—Pleading.

9C0107, 111
115-6.
2D 91
21C15 247
280-2-3

An agreement for the sale of the trade-fixtures, &c., of a public-house by W. to L. at a fair valuation, contained the following stipulations,—that, in addition to the amount of the valuation, L. agreed to pay W. 50*l.* goodwill; that L. was to be allowed to take, in the event of him leaving, the said sum of 50*l.*; that L. should pay to W. 100*l.* for painting, &c.; that the rent was to be 75*l.* yearly; that six months' notice to quit should be given by either party; and that, "by way of making this agreement binding, each of the above contracting parties have deposited in the hands of H. the sum of 40*l.* each; and either party failing to complete this agreement shall forfeit to the other his deposit-money as and for liquidated damages."

In an action by L. against W. for refusing to sell pursuant to the agreement, "whereby the plaintiff had lost the advantage which would have accrued to him from the performance of the agreement by the defendant, and had lost the use of the money paid by him as such deposit as aforesaid :"—

Held, that the plaintiff's remedy for the breach was confined to the recovery of the 40*l.* deposited with H.

Plea, that the plaintiff sued H. for the two sums of 40*l.* deposited with him "as and for liquidated damages in respect of the said breaches, and recovered judgment in respect thereof :"—

Held, no answer to the action.

THE first count of the declaration stated that it was agreed in writing between the plaintiff and the defendant in the words and figures following, that is to say: "Memorandum of agreement made this 20th of May, 1871, between William Whitaker and James Lea, of &c., whereby W. Whitaker agrees to sell and James Lea to purchase the trade-fixtures, household furniture, and effects at the New Inn, Hunslet Road, Leeds, at a fair valuation to be made by Henry Hargreaves and Thomas Weatherby, or their umpire, whose decision shall be final; the rent, rates, and licences to be proportioned and paid in the usual manner: That, in addition to the amount of such valuation, the said James Lea agrees to pay unto W. Whitaker the sum of 50*l.* goodwill: The said James Lea is to be allowed to take, in the event of him leaving, the said sum of 50*l.*: And that further it is agreed that James Lea shall pay unto W. Whitaker the sum of 100*l.* for painting, &c.: The rent to be, including the cow-stable, the sum of 75*l.* yearly, to

be paid quarterly; and six months' notice, to expire at the end of the then current year, to be given by either party: And, by way of making this agreement binding, each of the above contracting parties have deposited in the hands of Henry Hargreaves the sum of 40*l.* each; and either party failing to complete this agreement shall forfeit to the other his deposit-money as and for liquidated damages: Possession to be given and money to be paid on or before the 19th day of June, 1871." Averment, that, although all times had elapsed and all conditions precedent had been performed, and all things had happened, necessary to entitle the plaintiff to have the agreement carried out and performed on the defendant's part by the defendant, and to maintain the action for breach thereof: Yet the defendant had wholly made default therein, and had refused and still did refuse to sell to the plaintiff the trade-fixtures, &c., pursuant to the agreement, and to carry out and perform the agreement on his part to be carried out and performed: Whereby the plaintiff had lost the advantages which would have accrued to him from the performance of the agreement by the defendant, and had lost the use of the money paid by him as such deposit as aforesaid, and had incurred expense in endeavouring to procure the performance of the agreement by the defendant.

Sixth plea, to the first count, that, in pursuance of the alleged agreement, the plaintiff and defendant deposited in the hands of Hargreaves the sum of 40*l.* each, and that afterwards the plaintiff alleged that the defendant had committed divers breaches of the agreement, which breaches were the breaches now sued for, and claimed from Hargreaves the two several sums of 40*l.* deposited in his hands as and for liquidated damages in respect of the said breaches; and, Hargreaves refusing to deliver to the plaintiff the said several sums, the plaintiff commenced and prosecuted an action in this Court for and in respect of the said several sums, and recovered judgment in respect thereof.

The defendant also demurred to the first count, on the ground that the plaintiff's remedy was confined to the recovery of the money in the hands of Hargreaves. Joinder.

The plaintiff demurred to the sixth plea, on the ground that the plaintiff is entitled, notwithstanding the allegations in the plea, to maintain the action. Joinder.

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Nov. 28. *A. L. Smith*, for the plaintiff. Upon the true construction of the agreement set out in the declaration, the plaintiff's remedy for a breach is not confined to the 40*l.*, but he may recover damages to the extent of the real injury he has sustained. In *Icely v. Grew* (1) it was held that, where, in a contract of sale entered into at an auction, one of several stipulations is that, if the purchaser shall fail to comply with any of the conditions, the deposit shall be forfeited as liquidated damages, such condition forms no qualification of the general promise to complete the purchase, but the vendor may recover general damages for a breach. Numerous cases, from *Kemble v. Farren* (2) downwards, have decided that, where a covenant or agreement is entered into for the performance of several things, and a lump sum is to be paid in case of a failure to perform it, such sum is to be considered as a penalty, although the parties may have expressly stipulated that it shall be liquidated damages. That rule was acted upon in *Galsworthy v. Strutt* (3), *Betts v. Burch* (4), and *Sparrow v. Paris*. (5) Bramwell, B., in giving judgment in the last-mentioned case, says (6): "The question is, is this a sum of money recoverable? Is it, as popularly expressed, a penalty or liquidated damages? It is a sum payable on *one* event. It is not a sum to secure the performance of several matters. This is the distinction on which the question turns,—the names the parties give the money, penalty or liquidated damages, are immaterial." And see the cases collected in *Mayne on Damages*, 2nd ed. 100—104. Here, there are many events on the happening of which the 40*l.* deposit is to be forfeited. It never could have been contemplated by the parties that the plaintiff's remedy for the non-payment of the 50*l.* for goodwill and the 100*l.* for painting should be limited to the deposit.

[GROVE, J. The more probable intention of the parties was, that, in the event of either backing out before anything was done, his deposit should be forfeited.]

Patchett (*Day, Q.C.*, with him), *contra*. It is perfectly consistent with the declaration that the defendant declared off five minutes

(1) 6 N. & M. 467.

(2) 6 Bing. 141.

(3) 1 Ex. 659; 17 L. J. (Ex.) 226.

(4) 4 H. & N. 506; 28 L. J. (Ex.) 267.

(5) 7 H. & N. 594; 31 L. J. (Ex.) 137.

(6) 7 H. & N. at p. 599. *8 ju 25391*

after the signing of the agreement, and before the time had arrived for anything to be done by either party under it. In *Sainter v. Ferguson* (1), Cresswell, J., says: "If there be only one event upon which the money was to become payable, and there be no adequate means of ascertaining the precise damage that may result to the plaintiff from a breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation, in order to avoid the difficulty." This the parties have done here. All that the declaration complains of is that for which the 40*l.* was to be paid. The forfeiture of that precise sum is, as is observed by Lord Mansfield in *Lowe v. Peers* (2), "the essence of the agreement."

[KEATING, J. The real question after all is, what did the parties intend?]

A. L. Smith was heard in reply.

Cur. adv. vult.

Nov. 29. KEATING, J. In this case, which was argued yesterday, we have come to the conclusion that the declaration is bad. It sets out an agreement for the sale, by the plaintiff to the defendant, of a public-house, whereby several things are to be done by the plaintiff, whereas all that is to be done by the defendant is merely to assign the premises to the plaintiff; and then comes this provision:—"And, by way of making this agreement binding, each of the above contracting parties have deposited in the hands of H. Hargreaves the sum of 40*l.* each: and either party failing to complete this agreement shall forfeit to the other his deposit-money as and for liquidated damages." Now, it appears on the face of the declaration that the parties, at or before the execution of the agreement, had each paid 40*l.* into the hands of Hargreaves; and the question for us to determine is whether that sum was agreed to be the liquidated damages which either was to pay to the other on failure to perform the contract. The cases upon the subject of penalty or liquidated damages are very numerous. The result of them seems to be this, that what the Courts look at is, the real intention of the parties as it is to be gathered from the language they have used. No case that I am aware of has decided that, if it be manifest that the parties meant the sum fixed to be liquidated damages,

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(1) 7 C. B. 716, at p. 730; 18 L. J. (C.P.) 217.

(2) 4 Burr. 2225.

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the Court will interfere to frustrate that intention. In many cases it has been held that the parties could not have meant what they have apparently said; as, for instance, where a number of things are stipulated to be done, it has been held that the parties could not have meant that a large sum should be payable as liquidated damages for a failure to perform one or more of them. Looking at the language of this agreement, I come to the conclusion that the parties did intend the 40*l.* to be paid as and for liquidated damages for the breach of the agreement by either of them. I infer this from the fact that the 40*l.* has been placed in the hands of a stake-holder, as the agent of both. That reduces it to this, that the 40*l.* has already been paid by the defendant into the hands of the plaintiff's agent as and for liquidated and ascertained damages for the breach of the agreement by the former. My Brother Grove has called my attention to a case of *Reilly v. Jones* (1), which is very like the present, save as to the amount of the deposit. The defendant there agreed to take an assignment of the plaintiff's public-house and premises without requiring the lessor's title, that he would pay 2300*l.* for it, take the goods, fixtures, and effects at a valuation, and take possession of the house on or before the 29th of September; and the plaintiff agreed to give up possession of the premises, effects, and stock by that day, to assign licences, to repair or allow for all damaged outside windows, and to clear rent, taxes, and outgoings to the day of quitting possession; and then came the following: "and that either of them not fulfilling all and every part, the party not fulfilling shall pay unto the other the sum of 500*l.* *hereby settled and fixed as liquidated damages*; the deposit now paid (50*l.*) to be considered as part of the said damages, in case of default made by Jones, or returned in addition to the said damages, in case of default made by Reilly." It was there sought to treat the 500*l.* as a penalty, and to limit the plaintiff's verdict to the amount of damages actually sustained; but the Court held that, upon the whole agreement taken together the clear intention of the parties was that it should be taken as liquidated damages, and that effect must be given to that intention. I am not aware that that case has been at all shaken by any subsequent authority. The result is that, as I collect the real

(1) 1 Bing. 302.

intention of the parties to be that the 40*l.* was to be taken as liquidated damages, I hold the declaration to be bad. I think the plea is equally bad; it does not hit any point in the declaration. I therefore think there should be judgment for the defendant on the demurrer to the declaration, and judgment for the plaintiff on the demurrer to the plea.

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GROVE, J. I am of the same opinion. The true principle to be extracted from all the decisions is, that the Court must in each case gather from the whole instrument what was the real intention of the parties. *Reilly v. Jones* (1) is as nearly as possible quatuor pedibus with the present case. The distinction between them, if any, rather makes that an *à fortiori* case. The language of the stipulation for the deposit of 40*l.* by each party in the hands of Hargreaves, looks as if that was the agreed amount of damage which the stakeholder was to pay over to either of them upon a breach of the agreement by the other. That would apply equally whether on breach of one stipulation in the agreement or of the whole. It rather seems to me, however, that it means a substantial breach; and that seems to have been the ground upon which the decision in *Reilly v. Jones* (1) proceeded; for, Dallas, C.J., in the course of the argument, asks (2): "If the damage occasioned by breach of the most material provision amounted to more than the stipulated sum, could not the party refuse to pay more?" In the agreement there, there were several stipulations; but the substantial bargain was for the taking and assigning of the public-house, the others being subordinate stipulations. And, although Park, J., lays some stress upon the absence of any authority to shew that "where the parties have themselves employed the expression *liquidated damages*, the Court has holden the plaintiff should not recover, on breach of the agreement, the sum named as stipulated damages," (3) yet he goes on to say: "I will not say there is no such case; but, looking at the agreement itself in the present instance, I found my opinion on what appears to be the clear intention of the parties;" and he concludes his judgment thus: "The decisions all concur in laying it down that the intentions of the

(1) 1 Bing. 302.

(2) 1 Bing. at p. 304.

(3) Said to have been overruled as to this, in *Mayne on Damages*, 2nd ed. 104.

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parties ought to be pursued; and about those intentions there can be no doubt in the present instance." I found my opinion on the same ground. That case was cited in *Kemble v. Farren* (1), which is the leading case the other way, and not controverted. Spankie, Serjt., there puts the decision in *Reilly v. Jones* (2) on the ground that the whole object of the agreement was that the defendant should transfer to the plaintiff his interest in the public-house. So here, the main object of the agreement was that Whitaker should sell and Lea should purchase the goodwill, &c., of the public-house; and, if either party drew back, he was to forfeit the sum deposited. The language is clear and unambiguous; and, unless we are estopped by subsequent decisions, we must hold the 40*l.* to be a liquidated and ascertained sum to be paid for breach of the agreement, not for a failure to perform some of the minor stipulations for things to be done after the purchaser has taken possession. The declaration shews that the deposit was duly paid into the hands of Hargreaves, and so far the defendant had complied with the terms of the agreement. The plaintiff cannot recover damages beyond that sum.

DENMAN, J. I am of the same opinion. The true meaning of this agreement is, that, if either party fails to perform it, by refusing to assign or to take the premises, the sum to be paid by him as damages for that breach shall be the 40*l.* deposited with Hargreaves, and no more. *Reilly v. Jones* (2) is a very strong case. And there is a later case in this Court which is an equally strong authority in favour of the defendant, viz., *Hinton v. Sparkes*. (3) There, an agreement for the purchase of a public-house, with fixtures, &c., contained the following stipulations:—"And, as earnest of this agreement, the purchaser has paid into the hands of the vendor 50*l.*, which is to be allowed in part payment at the completion of this agreement. If the vendor shall not fulfil the same on his part, he shall return the deposit, in addition to the damages hereinafter stated: and, if the purchaser shall fail to perform his part of the agreement, then the deposit-money shall become forfeited in part of the following damages: and, if either

(1) 6 Bing. 141.

(2) 1 Bing. 302.

(3) Law Rep. 3 C. P. 161.

of the parties neglect or refuse to comply with any part of this agreement, he shall pay to the other 50*l.*, hereby mutually agreed upon to be the damages ascertained and fixed on breach hereof."

Instead of depositing the 50*l.*, the purchaser gave an I. O. U. for the amount. The purchaser failed to complete the purchase, and the vendor sold the public-house for 10*l.* less than the purchaser had agreed to pay for it. In an action by the vendor against the purchaser for breach of the agreement, and upon the I. O. U., it was held that the plaintiff was entitled to recover the 50*l.*, and was not limited to the amount of damage he had actually sustained. Bovill, C.J., in giving judgment, after stating the facts, says:

"The question turns upon the construction of the contract, and we have to ascertain the intention of the parties from the language they have used. In arriving at a proper conclusion, some assistance is to be derived from the decided cases. So far as the stipulation that 50*l.* shall be the damages ascertained and fixed on breach of the agreement goes, I should have no difficulty in holding, in conformity with the numerous authorities on the subject, that that was in the nature of a penalty, and not of liquidated damages. But there is a further stipulation, that, 'if the purchaser should fail to perform his part of the agreement, then the deposit-money shall become forfeited.' In none of the cases referred to do I find a provision like that. The 50*l.* was paid as a deposit, which in a given event was to be forfeited." And Willes, J., distinguishes the case in hand from *Betts v. Burch* (1) on the same ground. He says (2): "If this agreement had not contained the provision for forfeiture of the deposit on the purchaser's failure to fulfil his part of the contract, we should have been bound to follow the decision of the Court of Exchequer in *Betts v. Burch*. (1) I for one should have done so for the reasons set out in the judgments of Barons Martin and Bramwell, which present as satisfactory and full a view of the cases and of the principles and reasoning applicable to them as is to be found in any book, or indeed in all the books put together; and I will not attempt to add anything to what is to be found there. Here, however, there is an express provision that the deposit-money shall become forfeited should the purchaser fail to fulfil his part of the agreement. It is true the agreement

(1) 4 H. & N. 506; 28 L. J. (Ex.) 267.

(2) Law Rep. 3 C. P. at p. 166.

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adds 'in part of the following damages,' one of which is the 50%. I should presume that the reason for the insertion of those words is to be found in the fact of that part of the document being printed. We must either reject those words, or we must treat them as expressing that the deposit was really paid, and was to go in part satisfaction of the damages, if those damages should exceed the 50%. But I feel rather inclined to treat it as a proof that, so far as the purchaser was concerned, the damages were to be a fixed sum. In the event of the purchaser's default, the deposit is to be forfeited, and there is abundant reason for supposing that the parties meant that the damages as against the purchaser should be the sum they have set down. There are many cases to support that view, if it were necessary to refer to them." That case in principle is on all fours with the present, remembering that it is for the Court to construe the agreement in accordance with what they conceive to have been the intention of the parties. The result, therefore, of a failure on the part of the vendor to perform the agreement I think should be this, and this only, viz. that he forfeits the 40% which he deposited. The rest is immaterial. As to the plea, I think it as bad as the declaration. The stake-holder held the money for the use of the plaintiff. His right to sue for a breach was altogether independent of the action against Hargreaves. There will therefore be judgment for the plaintiff on the demurrer to the plea, and for the defendant on the demurrer to the declaration.

Judgment accordingly.

Attorney for plaintiff: *B. C. Pullan.*

Attorney for defendant: *Fidley.*

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*Lease—Breaches of Covenant to repair—Assessment of Lessees' Compensation
under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18)—
Notice to Lessor to treat.*

On the 15th of June, 1859, the plaintiff granted a lease to the defendants for twenty-one years, determinable at the option of either party at the expiration of the first seven or fourteen years. In February, 1866 (the first seven years of the term having elapsed), the lessees received notice from a railway company to treat for the purchase of their interest in the premises, under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); and the compensation payable to them by the company was assessed by an arbitrator on the 16th of April, 1867; on the 29th of July, 1870, judgment was signed for the amount, and an assignment was executed by the lessees, and the company took possession of the premises on the 21st of November, 1870.

On the 19th of June, 1868, the company gave the lessor notice to treat in respect of his interest, and he sent in a claim on the 29th; but nothing further was done,—the proposed line being abandoned.

In 1871, the lessor brought an action against the lessees for breaches of their general covenant to repair accruing as well before as since the assignment by the latter to the company.

Upon a case stated by an arbitrator for the opinion of the Court as to the principle upon which the damages were to be assessed:—

Held, that there was nothing to prevent the lessor from recovering substantial damages in respect of breaches committed after the notice to treat, but before the assignment by the lessees to the railway company; and that the proper measure of damages was the amount by which the plaintiff's reversion had become deteriorated at the date when the company took possession under the assignment, viz., the 21st of November, 1870.

ACTION for breach of a covenant to repair, &c., contained in a lease granted by the plaintiff to the defendants. Plea, payment into court of 10*l*. Replication, damages ultra.

The following case was stated by an arbitrator to whom the cause and all matters in difference between the parties were referred, for the opinion of the Court as to the principle upon which the damages were to be assessed:—

1. On the 15th of June, 1859, the plaintiff granted the defendants a lease of certain premises being No. 1 Devonshire Street, Bishopsgate Street, for a term of twenty-one years, to commence from the 25th of March then last past, with a proviso that either party might with a six months' notice in writing put an end to the

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term at the end of the seventh or fourteenth years. The lease contained covenants by the defendants to paint the inside in the sixth or seventh year of the tenancy, in the thirteenth or fourteenth, and also the twentieth or twenty-first, if the term so long continued, and to paint the outside every three years, and a general covenant to repair and at the end or other sooner determination of the demise yield up and leave unto the plaintiff, his heirs or assigns, the demised premises so well and sufficiently painted, sustained, &c., and repaired as aforesaid. The lease also contained a covenant to repair within three calendar months after notice in writing left by the plaintiff, or on his behalf, on the premises.

2. On the 7th of February, 1866, a notice to treat was served on the defendants under the Metropolitan (Tower Hill Extension) Railway Act, 1864 (27 & 28 Vict. c. cccxv), in respect of the premises; and under that notice the defendants treated with the Metropolitan Railway Company, and on the 16th of April, 1867, an award was made against the company to pay the defendants 3250*l*. On the 29th of July, 1870, judgment was signed for that amount, and on the 21st of November, 1870, the defendants assigned all their interest in the premises to the Metropolitan Railway Company.

3. On the 19th of June, 1866, a notice was served on the plaintiff under the Metropolitan Railway (Tower Hill Extension) Act, 1864, in respect of his interest in the premises; and on the 29th of June, 1868, the plaintiff sent in his claim against the company; but nothing further has been done by the plaintiff or the company with reference to the notice to treat of the 19th of June, 1866, or the claim of the 29th of June, 1868.

4. Either side was to be at liberty, on the argument of the case, to refer to the Metropolitan Railway Act, 1854 (17 & 18 Vict. c. ccxxi), and the Metropolitan Railway Act (Tower Hill Extension) Act, 1864 (27 & 28 Vict. c. cccxv).

5. There was a breach of the general contract to repair prior to the 7th of February, 1866; and there were continuing breaches of that covenant down to the commencement of this action on the 3rd of January, 1871. The defendants contended that they were not liable in this action for any breaches committed after the 7th of February, 1866; and, further, that they were not liable for any

breaches committed after the 19th of June, 1866; and that, at any rate, they were not liable for any breach committed after the 16th of April, 1867; and that, at any rate, they were not liable for any breaches committed after the 29th of July, 1870; and that, at any rate, they were not liable for any breaches committed after the 21st of November, 1870.

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6. By an order of the Poor Law Board made on the 10th of September, 1869, the East London Union was dissolved on the 30th of September, 1869; and by another order of the Poor Law Board made on the 20th of September, 1870, under the Dissolved Boards of Management and Guardian Act, 1870 (33 & 34 Vict. c. 2), it was provided that those who were acting as guardians of the East London Union at the time of dissolution, and the survivors of them, should continue in office for the purposes in that Act mentioned.

7. The defendants continued in possession of the premises until the 21st of November, 1870, and did some repairs.

8. The defendants had paid into Court 10*l.*, alleging that that sum was sufficient to satisfy the whole amount of damages for which they were liable in any view of the case. The plaintiff contended that in no view of the case was the sum paid in sufficient.

The question for the opinion of the Court was, whether the liability of the defendants ceased at any, and, if so, which of the dates in the fifth paragraph mentioned, so as to exonerate them from all breaches committed subsequently. The arbitrator was to determine, according to the principles laid down by the Court, what sum was sufficient to satisfy the plaintiff's claim, and to make his award accordingly.

Sir G. Honyman, Q.C. (*Watkin Williams* with him), for the plaintiff. There is nothing in the circumstances stated in the case to relieve the defendants from the performance of their covenants. It may be that their liability ceased when they assigned their interest in the premises to the railway company under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). But at all events they are liable for breaches of the covenant to repair down to that day. The circumstance of the repairs not having been

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actually done makes no difference : *Rawlings v. Morgan* (1) ; *Lidgett v. Secretan* (2) : the plaintiff is still entitled to substantial damages to the extent to which his reversion has been diminished in value by reason of the defendants' breaches of contract. In *Mayne on Damages*, 2nd ed. 189, the rule is thus stated : "Where the tenant covenants to keep in repair, an action may be brought for breach of covenant at any time during the continuance of the lease : *Luxmore v. Robson*. (3) And Lord Holt ruled (4) that, in such a case, the measure of damages would be the amount it would cost to put the premises in repair. This view, however, has been departed from in later cases, and it has been ruled that the measure of damages is the extent to which the marketable value of the reversion is injured : *Doe d. Worcester School Trustees v. Rowlands* (5) ; *Smith v. Peat*." (6) See also *Bell v. Hayden* (7), referring to *Marriott v. Cotton* (8) ; *Hunt v. Tweed* (9) ; *Coward v. Gregory*. (10)

A. G. Lewis (*Giffard, Q.C.*, with him), for the defendants. The contract of purchase by the railway company was completed on the 7th of February, 1866, by the giving of the notice to treat, the defendants and the company being from that date placed in the position of vendors and purchasers, and the company being thenceforth responsible for any breaches of the covenants entered into by the defendants : *Harding v. Metropolitan Ry. Co.* (11) The assignment by the defendants to the railway company being under the compulsion of an Act of Parliament, the defendants were disabled from further performance of their covenants, and therefore by law excused : *Baily v. De Crespigny*. (12) At all events, the defendants' liability ceased on the making of the award on the 16th of April, 1867, and then extended only to what it would have cost at that time to put the premises in repair. When the plaintiff treated with the company for the sale of his reversion, he was no longer in a position to demand substantial damages from the de-

(1) 18 C. B. (N.S.) 776 ; 34 L. J. (C.P.) 185. *11 Jan 42. 584*

(2) Law Rep. 6 C. P. 616.

(3) 1 B. & Ald. 584.

(4) In *Vivian v. Champion*, 2 Ld. Raym. 1125.

(5) 9 C. & P. 73'.

(6) 9 Ex. 161 ; 23 L. J. (Ex.) 84.

(7) 9 Ir. C. L. 301.

(8) 2 C. & K. 553.

(9) Exch. Not reported.

(10) Law Rep. 2 C. P. 153. *12 Jan 42. 1000*

(11) Law Rep. 7 Ch. 154.

(12) Law Rep. 4 Q. B. 180.

defendants; otherwise he will be making the company pay the same sum twice over; for they are bound to indemnify the defendants from the date of the award at latest. From that time the obligation to repair was shifted.

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[KEATING, J. A right to an indemnity assumes that there is a liability. Besides, that is a matter for the consideration of the arbitrator.]

In *Rawlings v. Morgan* (1) the term had expired. Here it had not. The proper measure of damages is the sum it would have cost to put the premises in repair at the time the defendants' interest in the term ceased.

.. *Sir G. Honyman, Q.C.*, in reply, referred to *Reg. v. Commissioners of Woods and Forests* (2), cited in *Hodges on Railways*, 5th ed. 208, 209.

KEATING, J. This is a special case stated by an arbitrator for the opinion of the Court as to the principle upon which the damages are to be assessed under the circumstances which he has stated. It appears that upon the 15th of June, 1859, the plaintiff granted to the defendants a lease of certain premises for twenty-one years, with power to either party to put an end to the term by notice at the expiration of the first seven or fourteen years. No notice was given, and the term still subsisted at the time the dispute arose between the parties. On the 7th of February, 1866, the Metropolitan Railway Company gave the defendants notice to treat for the purchase of their interest in the premises, under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); and proceedings were taken upon that notice which resulted in an award, made on the 16th of April, 1867, by which the company were ordered to pay the defendants a large sum. On the 29th of July, 1870, judgment was signed against the company; and on the 21st of November the defendants executed an assignment to them. On the 19th of June, 1866, a notice to treat was also given to the plaintiff in respect of his reversionary interest; and he sent in a claim on the 29th of June, but no further proceedings were taken by either party with reference to the purchase of the reversion.

(1) 18 C. B. (N.S.) 776; 34 L. J. (Q.B.) 497.
(2) 15 Q. B. 761; 19 L. J. (Q.B.) 497.

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Meanwhile the defendants, in breach of their covenant with the plaintiff, had suffered the premises to get out of repair; and they continued to be out of repair down to the time when this action was brought, in January, 1871. During that period the defendants had done some repairs, which is not a wholly unimportant circumstance; but there is no doubt that the premises continued to be out of repair down to and after the date of the assignment by the defendants to the company. The defendants, upon the supposed authority of *Baily v. De Crespigny* (1), insist that they are no longer liable upon their covenant to repair, the Act of Parliament which compelled them to assign their interest to the company having put it out of their power to perform it, and so brought them within the maxim "Lex non cogit ad impossibilia." But the facts of that case were totally different from those of the present. The lease there contained a covenant on the part of the defendant, the lessor, "that neither he nor his assigns would during the term permit any messuage, &c., to be built on a paddock fronting the demised premises." There was a notice from a railway company to treat for the purchase of the paddock, and a conveyance by the lessor to the company, after which the company erected a station thereon. An action having been brought against the defendant for breach of his covenant not to build or permit any messuage to be built on the paddock, the answer was, that, inasmuch as the Act of Parliament compelled the defendant to assign the land to the company, the defendant was not guilty of or contributory to the breach of covenant complained of. In the present case, however, the breach occurred before the conveyance by the defendants of their interest in the term to the company.

The defendants have paid 10*l.* into Court. They admit their breach of covenant, but they insist that they are not liable for any breaches subsequent to the notice to treat. I am of opinion that the liability of the defendants upon their covenant did not cease before the execution of the conveyance by them to the company, and the possession taken by the latter, viz. the 21st of November, 1870. The parties have agreed that the intermediate time between the date and the commencement of the action is of no importance.

(1) Law Rep. 4 Q. B. 180.

The defendants, in addition to their attempt to exonerate themselves by reason of their contract with the railway company, insist that the plaintiff is precluded from suing them for substantial damages, because of the notice to treat given to him by the company, and of the claim sent in by him, which they contend amounts to a contract of purchase and sale. But I am clearly of opinion that that which took place between the plaintiff and the railway company could not have the effect of relieving the defendants from their liability to the plaintiff. I see nothing to prevent the plaintiff from suing the defendants for breaches of covenant down to the time of the execution by the latter of the conveyance to the company.

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Then as to the principle on which the damages are to be assessed, I think they are not limited to nominal damages. I think the rule laid down in the more recent cases, viz. that the true measure of damages is the extent to which the lessor's reversion is damnified by the want of repair, is the sounder rule, notwithstanding the other rule has the sanction of the high authority of Lord Holt. The arbitrator will practically have no difficulty in assessing the damages upon this principle.

GROVE, J. I am of the same opinion. It has not been contended that, if this had been the ordinary case of a voluntary parting with the term by the lessee, the latter would not have been liable for breaches of covenant down to the time of the assignment. But it is said that this is an exceptional case, by reason of the defendants having been put out of the land under the compulsory powers conferred upon the railway company by the Lands Clauses Consolidation Act, 1845. *Baily v. De Crespigny* (1), which is the only case at law upon the subject, is clearly distinguishable. The covenants were different from those in the present case, and there had been an actual transfer of the property to the railway company before breach. The thing complained of, viz. building on the paddock, was not done by the lessor, but by the company after they had acquired possession of the land under the compulsory power of the Act. There was no such change of pos-

(1) Law Rep. 4 Q. B. 180.

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session here. The non-repair for which the lessor claims damages all occurred whilst the lessees were in possession of the premises: and, though according to *Harding v. Metropolitan Ry. Co.* (1) there may have been a binding contract of purchase and sale from the time the amount of compensation was fixed by the award, I see nothing to exempt the defendants from their obligation to perform their covenants until they were turned out of possession. From that period, viz. the 21st of November, 1870, when the property and the possession passed to the railway company, and the defendants could not effect the repairs, their liability ceased. It has been said that to hold the defendants liable for breaches down to that time would or might be giving the lessor compensation twice over. It is not necessary to enter into that; the arbitrator will take care that justice is done. Although it seems to be rather a complex matter if gone into theoretically, I think there will be no practical difficulty in assessing the proper amount of damages upon the principle stated by my Brother Keating. It might perhaps be said that the real damage might have been prevented if the lessor had looked to his own interests at the proper time. But I think it comes to very much the same thing in the end.

DENMAN, J. The arbitrator has, with his usual accuracy, raised two questions for our decision,—1. At which of the dates mentioned in the fifth paragraph of the case the liability of the defendants upon their covenant to repair ceased; 2. Upon what principle the damages are to be assessed. The argument has been confined to the question whether the liability enured until the 21st of November, 1870, the day on which the railway company took possession of the premises under the assignment. I agree with the rest of the Court that it did not cease until that day. The argument on the part of the defendants was based upon two cases, viz. *Baily v. De Crespigny* (2) at law, and *Harding v. Metropolitan Ry. Co.* (1) in equity. Both those cases, when accurately looked at, will be found to be authorities the other way. In the case in equity it was decided that after the amount of compensation had been ascertained by the award, the owner of the land would have a right to a decree

(1) Law Rep. 7 Ch. 154.

(2) Law Rep. 4 Q. B. 180.

for specific performance. In the course of the judgment it is said that an indemnity would have to be given by the defendants against that which the plaintiff is suing for here. That necessarily involves the notion that the plaintiff has such rights. As to the principle upon which the damages are to be assessed, there will be but little difference whether the old or the more modern rule be adopted. Mr. Mayne has, 2nd ed., 182, 190, with his usual accuracy, given a summary of the cases upon this subject, and he arrives at the conclusion that the better opinion is that the proper measure of damages is the extent to which the actual value of the reversion is injured. *Coward v. Gregory* (1) and *Hunt v. Tweed* (2) seem also to establish this to be the true rule. We must, therefore, lay that down as the principle by which the arbitrator is to be guided. The result of our opinion is that the defendants' liability did not cease until the 21st of November, 1870, and that the measure of damages will be the amount by which the plaintiff's reversion had become deteriorated on that day.

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Judgment accordingly.

Attorneys for plaintiff: *Thomas & Hollams.*

Attorneys for defendants: *A. J. Baylis & Son.*

(1) Law Rep. 2 C. P. 153.

(2) Not reported.

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Nov. 12.

LEBEAU AND ANOTHER v. THE GENERAL STEAM NAVIGATION
COMPANY.

Ship and Shipping—Carriers—Bill of Lading—Description of Goods—"Weight, Value, and Contents unknown"—Misrepresentation—Estoppel.

Port 682 The plaintiffs delivered to the defendants, for carriage on board the defendants' ship, a closed case containing silk goods. The bill of lading, as tendered by the plaintiffs for signature, described the contents of the case as linen goods; but before signing it the captain impressed upon it with a stamp the words "Weight, value, and contents unknown." The freight charged for silk was higher than that for linen goods, and the freight paid for the goods so delivered was that for linen goods; but the plaintiffs represented the goods to be linen inadvertently and without fraudulent intention. On the ship's arrival at her destination it was found that two pieces of silk had been abstracted from the case.

In an action by the plaintiffs against the defendants as common carriers for non-delivery of the silk goods so lost:—

Held, that the result of the addition of the words "Weight, value, and contents unknown" to the bill of lading was completely to do away with the effect of the description of the goods as linen, and that consequently the defendants' contract was to carry the case and its contents, whatever they might be; and the plaintiffs were entitled to maintain the action.

Quere whether, even without the additional words, the misrepresentation having been made without fraud could have had the effect of avoiding the contract for carriage of the goods by the defendants as common carriers.

Jessel v. Bath (Law Rep. 2 Ex. 267) followed.

ACTION in the Mayor's Court, London.

Declaration for that, in consideration that the plaintiffs would deliver to the defendants, as carriers of goods for hire, certain goods, to wit, silk broadstuffs, to be by the defendants carried from Boulogne to London, and there delivered according to the direction of the plaintiffs—certain perils, &c., excepted—for freight to be paid by the plaintiffs to the defendants in that behalf, the defendants promised the plaintiffs to carry the said goods from Boulogne to London, and there deliver the same to the directions of the plaintiffs in that behalf, except as aforesaid.

Averments of delivery of the goods to the defendants, and performance of conditions precedent.

Breach, that the defendants only delivered a portion of the said goods to the plaintiffs.

Second count alleged a bailment of goods by the plaintiffs to

See an entry port 129.

the defendants to be taken care of and re-delivered to the plaintiffs on request for reward to the defendants, and non-delivery of such goods.

Pleas, denying the promise, the breaches, and to the first count denying the delivery of the goods to the defendants for the purpose and on the terms alleged.

Issues.

The plaintiffs had given particulars of demand, which specified their claim to be in respect of "two pieces of silk broadstuffs delivered to the defendants on board their steamer *Cologne*, on the 25th day of October, 1871, in a case marked L. C., and numbered 1146, and S. M. 674, for carriage to and warehousing in London." At the trial before the Deputy Recorder the facts appeared to be as follows:—The plaintiffs had delivered the goods in question, consisting of what are called "silk broadstuffs," inclosed in a case, to the defendants, who are carriers of goods between Boulogne and London, for carriage by the defendants from the former place to the latter on board the defendants' steamer *Cologne*. The bill of lading, as tendered to the captain for signature, described the goods contained in the package as "linen goods;" but before it was signed by the captain the printed words "Weight, value, and contents unknown" were impressed upon it with a stamp by the captain or the defendants' agent.

Upon the arrival of the vessel at London it was found that the case had been tampered with, and two pieces of silk broadstuff abstracted. It appeared that the freight for silk goods would be higher than that for linen, and that the freight was paid as for linen goods. The jury found, in answer to questions left to them by the learned judge, that the goods in question were safely delivered to the defendants; that they were lost while in their care as carriers; and that the goods were not wilfully misdescribed as linen goods that they might be carried at a lower rate, but were inadvertently misdescribed.

The verdict was entered for the plaintiffs for 18*l.* 11*s.* 1*d.*, the value of the goods, with leave to the defendants to move to enter a nonsuit or a verdict for themselves on the ground that there was no evidence of the contract alleged in the declaration, and that the plaintiffs were estopped from proving the delivery of the

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goods mentioned in their particulars to the defendants by the bill of lading.

A rule nisi had been obtained accordingly, against which

Field, Q.C., and *Waddy*, shewed cause. The contract which is evidenced by the bill of lading, was to carry the package with the particular mark and number thereon. The inaccurate description of the contents does not destroy such contract: *Bates v. Todd* (1); *McCance v. London and North Western Ry. Co.* (2) It is at most merely a representation, and the jury having found that it was not made fraudulently, but by inadvertence, it cannot avoid the contract. There is nothing to show that the misstatement innocently made to the defendants at the time of the shipment at all put them off their guard or altered their position: see the judgment of Blackburn, J., in *Knights v. Wiffen* (3). Moreover, the effect of the representation is entirely done away with by the addition of the words "Weight, value, and contents unknown." The captain refuses to receive the goods as being of any particular description, and the effect is that the contract is for carriage of the goods contained in the package without reference to the nature of the contents. The case of *Jessel v. Bath* (4) is an authority that such is the true construction of this bill of lading. Martin, B., there says: "The person, therefore, signing this bill of lading, by signing for the amount with this qualification, 'Weight, contents, and value unknown,' merely means to say that the weight is represented to him to be so much, but that he has himself no knowledge of the matter;" and the rest of the Court put the same construction on the document. If this be the true effect of the contract, no question of estoppel can arise.

Talfourd Salter and *Finlay* supported the rule. It is submitted that there was no contract on the part of the defendants for the carriage of these silk broadstuffs. The bill of lading is the contract, and that contract is for the carriage of linen stuffs. The memorandum, "Weight, value, and contents unknown," makes no difference in this respect. The meaning of that is that the shipowner protects himself from being concluded by the bill of lading, if the goods are

(1) 1 M. & Rob. 106.

(2) 3 H. & C. 343; 34 L. J. (Ex.) 39.

(3) Law Rep. 5 Q. B. 660, at p. 665.

(4) Law Rep. 2 Ex. 267.

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not really such as described ; but he does not thereby contract to carry any other goods than linen goods. He merely says " I undertake to carry the goods you describe, but you must prove that the contents of the case were what you describe, if you seek to make me responsible for such goods in the case of a loss. I am not to be bound to deliver up linen if the contents were brickbats." This construction is quite consistent with the decision in *Jessel v. Bath*. (1)

[BRETT, J. But if he is not bound by the description, can the other side be in the absence of fraud ?]

The document must receive a construction that will give effect to all parts of it, if possible. The expression " contents unknown " is not necessarily inconsistent with the description of the goods as " linen goods." If interpreted as meaning that though the goods are linen goods, the nature and quality of such linen goods are unknown, all the expressions in the document will receive a meaning.

Taking it that notwithstanding the memorandum there is a representation of the goods as linen goods, it is contended that if such a representation be untrue, though without fraud, it will avoid the contract for carriage of the goods, or at any rate release the carrier from his liability as a common carrier: 2 Kent's Commentaries 802, s. 604. The question in such cases is not what is the intention of the party making the representation, but what is the effect on the carrier's position. If the effect of the untrue representation is to deceive the carrier as to the value, and to induce him not to bestow on the goods the care and diligence which their value requires, the contract itself becomes a nullity: Story on Bailments, 539, ss. 567-569; Angel on Carriers, 235, ss. 262, 264; Smith's Mercantile Law, 8th ed. p. 279; *Batson v. Donovan* (2); *Titchburne v. White* (3); *Tyly v. Morrice* (4); *Kenrig v. Eggleston* (5); *Belfast and Ballymena Ry. Co. v. Keys*. (6)

[DENMAN, J. These authorities seem to refer to cases where the carrier has made inquiries, and the answer is untrue. Here there was no specific inquiring by the carrier.]

(1) Law Rep. 2 Ex. 267.

(2) 4 B. & Ald. 21.

(3) 1 Str. 145.

(4) Carth. 485.

(5) Aleyn, 93.

(6) 9 H. L. 556.

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The effect is the same. There is a voluntary statement, the effect of which is to put him off inquiring.

[GROVE, J. The cases seem to have drawn some distinction between voluntary statements and cases where the carrier has inquired, though I confess I do not see any.]

Moral fraud is not necessary to discharge the carrier. The defendants have never undertaken to act as insurers of any goods but those described by the consignors. The case is like that of *McCance v. London and North Western Ry. Co.* (1), where a fact was treated by the parties as the basis of the contract, and it was held that one party could not afterwards dispute the truth of it. The defendants are, therefore, mere involuntary bailees of the goods, and there is no question here of any negligence on the part of the defendants beyond the mere fact of non-delivery. If they are not liable as common carriers, they are entitled to succeed on these facts.

[BRETT, J. You would make this like a case of marine insurance, where a concealment of a material fact, though without fraud, is fatal. The law, as to the meaning of such expressions as "Weight, value, and contents unknown," is laid down in *Parsons on Shipping*, 197, and the case of *Clark v. Barnwell* (2) is cited, where the bill of lading contained the clause, that the boxes containing the goods were shipped in good order "contents unknown," and the Court said "it is obvious, therefore, that the acknowledgment of the master as to the condition of the goods when received on board extended only to the external condition of the cases, excluding any implication as to the quantity or quality of the article, condition of it at the time received on board, or whether properly packed or not in the boxes."]

Secondly. The plaintiffs are estopped from proving delivery of silk goods to the defendants under this bill of lading. The goods were, in consequence of the statement that they were linen, carried at a less rate of freight; and the defendants, therefore, have acted upon the plaintiffs' representation, and altered their position for the worse, and the plaintiffs cannot now be permitted to deny the truth of the representation. The plaintiffs cannot prove their case without shewing the statement to have been untrue.

(1) 3 H. & C. 343; 34 L. J. (Ex.) 39.

(2) 12 How. 272.

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[BOVILL, C.J. This question of estoppel comes back really to the same question as that involved in the first point; for if there were a contract to carry the goods, whatever they were, the nature of the goods delivered becomes immaterial; if there were no contract at all, then it is equally immaterial.]

They also cited *Polhill v. Walter* (1); *Knights v. Wiffen* (2); *Cahill v. London and North-Western Ry. Co.* (3); *Foster v. Colby* (4); *Hollister v. Nowlen* (5); *Phillips v. Earle*. (6)

BOVILL, C.J. In this case the jury have negatived the existence of any fraud or wilful misrepresentation. No question is raised by the form of this rule as to the proper amount of the damages, but the application is simply to enter a nonsuit or verdict for the defendants. The contract upon which the plaintiffs in substance declared was that contained in the bill of lading. It appears to me that the effect of that document was, that though the plaintiffs represented that the package in question contained linen goods, the defendants by their agent refused to contract upon the footing that the contents of the case were to be taken absolutely to be of the description that the shippers stated. By the printed memorandum, in my opinion, they repudiated all knowledge of the contents of the case, and all intention of contracting with regard thereto, and contracted to carry the package, whatever its contents might be. That was the view taken in the case of *Jessel v. Bath* (7), and that seems to me the correct view of such a contract. It therefore lies on the defendants to get rid of their liability under the contract, and this they seek to do by reason of the statement made by the plaintiffs as to the nature of the goods. But this statement must be taken as having been made innocently and without fraudulent intention. I do not see how such a statement could avoid the contract. If there had been any fraud or wilful mis-statement with a view to avoiding the payment of a higher rate of freight, the case might have fallen within some of the

(1) 3 B. & Ad. 114.

(2) Law Rep. 5 Q. B. 660.

(3) 10 C. B. (N. S.) 154; 13 C. B.

(N. S.) 818; 30 L. J. (C. P.) 289; 31

L. J. C. P. 271. *79m N.S. 1164*

89m N.S. 1163

(4) 3 H. & N. 705; 28 L. J. (Ex.)

81.

(5) 19 Wend. 234.

(6) 8 Pick. (Mass.) 182.

(7) Law Rep. 2 Ex. 267.

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authorities cited by the counsel for the defendants, and the contract might have been avoided by the fraud.

But all fraud having been negatived, it is clear that the contract remains, and that such contract has been broken. I can therefore see no ground for entering a verdict for the defendants. Possibly, upon the evidence, there might have been ground for contending that the finding of the jury or the damages should have been different; but no such points have been raised before us. If the company conceive that they are defrauded by untrue statements as to the nature of goods shipped, they may easily protect themselves by so framing their bills of lading as to make the truth of the description of the goods a condition of the contract, so as to absolve themselves from liability if the statement be false, whether it be fraudulent or not. In most of the cases of this sort, where it has been sought to relieve the carrier from liability by reason of an untrue statement by the consignor, it has been on the ground that the statement was fraudulent. But apart from fraud, if my view of the contract in this case be correct, I can see no ground for an estoppel on either side, for the statement made by one is not accepted by the other. The parties do not agree on the footing that the package contains linen goods only, but that it may contain any other sort of goods. It may be that the plaintiffs might by their statement have been precluded from recovering any greater damages than if the parcel had contained linen. My impression at present—though, the point not having been argued, I pronounce no definite opinion on it—is, that if the point were open such a limitation of the damages might be the result. As the case now comes before us, the defendants cannot succeed without shewing that they were altogether absolved from their contract; which, for the reasons I have given, I think they cannot do. On these grounds I think this rule must be discharged.

BRETT, J. In this case the plaintiffs were forwarding agents at Boulogne, and they shipped as shippers certain goods in a closed case on board the defendants' ship, to be carried from Boulogne to London. The shippers presented a bill of lading for signature, in which the contents of the case were described as linen goods. The goods were really what are called silk broadstuffs. The freight

for such goods would have been larger than that for linen, but the freight in fact paid was that for linen. It must be taken that at the time of the shipment and presentment of the bill of lading the plaintiffs did not know that the goods were not linen goods, for the jury have found that the misrepresentation was innocent. On presentment of the bill of lading the captain or shipowner's agent did not sign it as offered, but stamped on the face of it the words "Weight, value, and contents unknown," having in fact taken the goods on board without examining the contents of the case. The captain asked no questions of the shippers as to what the contents of the case were. There was no positive evidence of any negligence on the part of the defendants' servants, but simply the fact that at the end of the voyage it was found that though the case was there part of the contents was gone. Under these circumstances the plaintiffs bring an action, not charging the defendants with negligence, but upon their absolute liability as common carriers, to deliver the goods in the same condition as they were delivered to them, and describing the goods in the particulars in the action as silk broadstuffs.

The question now is whether there was evidence to go to the jury of any such liability on the part of the defendants with regard to the goods actually shipped, i.e., silk broadstuffs. The application to the Court below was to enter a nonsuit, and the Court having refused to do so, the present application is to the same effect.

Now, even if the bill of lading had not had indorsed upon it the words "Weight, value, and contents unknown," still there would have been a delivery of the goods shipped to the defendants and an acceptance of such goods by them to be carried for reward. What, then, would have been the effect of the statement in the bill of lading that the goods were linen goods? It is not necessary to decide the point, and I do not decide it, but I am inclined to think that that misrepresentation would not avoid the contract. The present question arises between shipper and shipowner, and it does not appear to me that as between shipper and shipowner such a misstatement, though of a material fact, if innocent, can of itself avoid the contract, but that in order to do so it must be wilful and fraudulent. I should be inclined to think that the bill of lading, as between shipper and shipowner, would attach as the

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contract relating to the goods shipped under it whatever they were.

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It is contended, however, that a misrepresentation having been made by the shipper, which would impose a larger liability on the shipowner than if the description in the bill of lading had been correct, that statement must be taken to have been intended by both parties to form, though not part of the contract, the basis of the contract within the doctrine laid down in the case of *McCance v. London and North Western Ry. Co.* (1), and that, therefore, the plaintiffs are not at liberty to shew that silk goods were delivered to the defendants. With reference to this contention it appears to be very material to consider the effect of the stamped memorandum. The bill of lading, as presented by the shipper to the captain, contains an innocent misrepresentation which is that of the shipper, not of the shipowner, that the goods are linen. Did the shipowner act on that misrepresentation? Did he accept it as the basis of the contract? The cases cited in Parsons on Shipping, 198, and especially *Clark v. Barnwell* (2), shew the meaning of such a memorandum as this stamped on the bill of lading by the captain before he will sign it. When a closed case is offered to him with a representation as to the nature of its contents on the bill of lading he may accept it without alteration of the bill of lading; but if he alters the bill of lading by inserting a statement that the contents are unknown, it is clear, as a matter of business and it seems from the American cases, and *Jessel v. Bath* (3), to be the law, that he thereby declines to accept the declaration of the shipper; he says in effect, "I accept this case as it appears on the outside; I know nothing about the inside, and will be bound by no statement in reference to it." It appears to me that this completely does away with the statement made by the shipper with respect to the nature of the goods, and both parties must then be taken to agree to the bill of lading in the modified form by which there is no binding statement as to the contents of the package, but the carrier undertakes in his capacity as carrier to carry the case whatever it contains. If so, he must be liable as a carrier upon his contract for non-delivery of the goods, whatever

(1) 7 H. & N. 477; 3 H. & C. 343;

(2) 12 How. 272.

31 L. J. (Ex.) 65; 34 L. J. (Ex.) 39.

(3) Law Rep. 2 Ex. 267.

7 H. & N. 477, 3 H. & C. 343, 31 L. J. (Ex.) 65, 34 L. J. (Ex.) 39.

they were, really contained in the case. Whether he is liable to the value of the goods really contained in the case, or only to the value of such goods as they were represented to be by the shipper is a question not now before us, and one on which I had rather express no opinion, though at the same time I do not wish to be considered as intending to differ from my Lord's suggestion that the carrier in such a case may be liable only to the value of the goods as they were represented to be. Here the only question is, whether a nonsuit should have been directed on the ground that there was no contract with regard to the goods in respect of which the action was brought.

It was further contended on behalf of the defendants that the representation of the plaintiffs as to the contents of the package created an estoppel, because the position of the shipowner was thereby altered. It was laid down in the case of *Walker v. Jackson* (1), by Lord Wensleydale, who was certainly a master in the art of laying down general propositions of mercantile law, that as a general rule "if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary; if he ask no questions, and there is no fraud to give the case a false complexion on the delivery of the parcel, he is bound to carry it as it is," i.e., to carry it as a carrier.

In point of fact no question was here asked by the shipowners on the shipment of the goods. There was only a statement by the shippers on the bill of lading which they, the shipowners, refused to accept. The case, therefore, comes within the rule so laid down in *Walker v. Jackson* (1), and that case shews that the real contract was that the defendants should carry as carriers whatever was in the package.

GROVE, J. I must say that I have entertained some doubts in the course of the argument, which are not so entirely removed as I could wish, but they are not strong enough to induce me to differ from the rest of the Court. Putting aside at present the printed words afterwards stamped upon the bill of lading, I should have been inclined to hold that where a party entering into a contract for carriage of goods even without fraud describes the goods to be

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(1) 10 M. & W. 161, at p. 169.

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carried as goods of a certain character, the contract is to carry goods of that character, and not of another character; but then we have to deal with the additional words which were put in to protect the shipowner. The effect of these words without the description given of the goods as linen goods, would be to create a contract on the part of the shipowner to carry the goods whatever they were. My Lord is of opinion that the effect of the whole taken together is a refusal to contract on the footing that they were linen goods. I cannot say I am entirely free from doubt as to this construction of the document. I think there was a great deal in Mr. Salter's argument that those words were to be taken as being for the protection of the carrier, and not as repudiating the statement of the person delivering the goods; that the carrier thereby, in effect, says: "I take the goods as you represent them to be, but I am not thereby to be rendered absolutely responsible as if the package contained goods such as described, even if it does not."

But it may be fairly urged in answer to that contention that a construction of the document which would allow the carrier to take such a position is not a reasonable one; that he cannot be allowed to guard himself from all the consequences of the statement on the one hand and claim the benefit of it on the other; to bind the other party by it while he himself refuses to be bound. That appears to be the view taken by the rest of the Court, and I am not prepared to dissent from it. I do not think that the case of *Jessel v. Bath* (1), though no doubt strongly in the plaintiffs' favour, is conclusively so. It seems to me that it might be distinguished on the ground that the words in this case were inserted only for the protection of the shipowner, but as I have said that argument may be met on the ground that such a construction would give an unreasonable advantage to the shipowner. With respect to the question as to the amount of damages to which the shipowner might be liable under the circumstances of the case, as the point is not now before us I desire to express no opinion, though I think that the difficulties arising with reference to the assessment of damages under the circumstances of the present case might afford an argument of considerable weight in favour of

(1) Law Rep. 2 Ex. 267.

the defendants' contention on the question now before us. On the whole, however, I think, though not without some doubt, that the words indorsed by the shipowner on the bill of lading amount to a repudiation by the shipowner of the statement that the goods were linen goods, and an agreement to carry them whatever they might be.

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DENMAN, J. After hearing the able arguments on both sides, I cannot say that I entertain any doubt that this rule should be discharged. I think the true effect of what took place with reference to the bill of lading was to create a contract on the part of the shipowner to carry the package whatever it might contain, and consequently that there was evidence to go to the jury of the contract alleged in the declaration. During the argument, the suggestion was thrown out that the expression "contents unknown" might not go so far as to be inconsistent with the contract being for the carriage of linen goods; but all doubt on that point appears to me to be removed by the passage cited by my Brother Brett from Parsons on Shipping, and the cases there referred to. It seems to me clear that the true meaning goes further than that contended for by the defendant. The case comes, therefore, within the decision in *Jessel v. Bath* (1), and the general principle laid down in the case of *Jackson v. Walker*. (2) With respect to the question of damages, I offer no opinion, as it is not raised in the present case.

Rule discharged.

Attorneys for plaintiffs: *Learoyd & Learoyd*.

Attorneys for defendants: *Ashley & Tee, for Phillips & Fearce*.

(1) Law Rep. 2 Ex. 267.

(2) 10 M. & W. 161, at p. 169.

END OF MICHAELMAS TERM, 1872.

CASES
 DETERMINED BY THE
COURT OF COMMON PLEAS,
 AND BY THE
COURT OF EXCHEQUER CHAMBER
 ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,
 IN AND AFTER
HILARY TERM, XXXVI VICTORIA.

1873

CASELLA AND ANOTHER *v.* DARTON.*Jan. 11.*

Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67)—Leave to appear—Affidavit of Merits.

To entitle a defendant served with a writ under the Bills of Exchange Act, 1855, to leave to appear and defend, it is not necessary that he should produce an affidavit of merits. It is enough if the affidavit discloses any defence, whether legal or equitable.

THE defendant was served with a writ under the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), as the acceptor of a bill of exchange for 96*l.* 7*s.* 6*d.* drawn at Wintershur (Germany) the 25th of July, 1872, payable four months after date to the order of Rieter, Liegler, & Co., addressed to F. Darton & Co, London, and accepted "F. Darton & Co."

On the 21st of December, 1872, the defendant obtained an order of Master Gordon for leave to appear, upon an affidavit which stated that on the 13th of December instant he was served with a copy of a writ of summons under the Bills of Exchange Act; that

he was sued as the acceptor of the bill indorsed on the writ, upon and in respect of the acceptance appearing thereon as being made by and in the name or firm of F. Darton & Co.; that the said firm of F. Darton & Co. at the time of the said acceptance consisted and still consisted of himself and one Edwin Fox, who was still living, and who at the commencement of the suit was, and still was, resident within the jurisdiction of this Court; that the said acceptance was and is an acceptance by him (the defendant) and Edwin Fox jointly, and not an acceptance by him (the defendant) alone; and that the said Edwin Fox ought to have been joined in the writ as jointly liable with him (the defendant) upon and in respect of the said acceptance.

On the 4th of January, 1873, the plaintiffs' attorney took out a summons to rescind Master Gordon's order, on the ground that it was obtained without an affidavit of merits. This summons came on before Brett, J., on the 7th, and the matter was referred to the Court.

Grantham moved for a rule calling upon the defendant to shew cause why the order of Master Gordon should not be rescinded. The 2nd section of the Bills of Exchange Act, 1855, enacts that "a judge of any of the Courts shall, upon application within the period of twelve days from such service, give leave to appear to such writ and to defend the action, on the defendant's paying into Court the sum indorsed on the writ, or upon affidavits satisfactory to the judge which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms as to security or otherwise as the judge may deem fit." The affidavit here, so far from disclosing a "legal or equitable defence" to the action, amounts merely to a plea in abatement.

[KEATING, J. A plea of the non-joinder of a joint contractor discloses a legal defence. How can the defendant avail himself of that defence unless he has leave to appear? He has a right to avail himself of any legal or equitable defence which the law gives him. The Act does not require an affidavit of merits. Its terms are very large. I have often heard Mr. Justice Williams in this

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Court say that if the affidavit discloses any legal defence, the party ought to have leave to appear.]

At all events the defendant should pay the money into Court.

BOVILL, C.J. I think the master was perfectly right in making the order which he has made. It may be that the defence suggested is a technical one, but it is a legal defence. All the parties to a contract ought to be joined. The non-joinder of a defendant affects the rights of the others, more particularly as to survivorship. The Bills of Exchange Act, 1855, never contemplated taking away any legal defence a defendant might have: the words are that the judge shall give the party leave to appear to the writ, "upon an affidavit satisfactory to the judge which discloses a legal or equitable defence." The affidavit here does disclose a clear legal defence to the action,—a defence, it is true, which may be met by an amendment,—but still a defence. It was imperative, therefore, on the master to make the order. And I am at a loss to perceive upon what pretext we can be called upon to impose terms, when the defendant has brought himself clearly within the words of the Act. This rule must be refused.

KEATING, J. I am entirely of the same opinion.

BYLES, J. I am of the same opinion. The statute says that the judge (or the master now) shall, if there be an affidavit satisfactory to him which discloses a legal or equitable defence, give the defendant leave to appear to the writ. This affidavit does disclose a legal defence.

BRETT, J. The defendant is sued as a party to a bill of exchange; and he has obtained leave to appear and defend, upon an affidavit which discloses a legal defence to the action. The argument urged before us is that, assuming this to be a legal defence, it is not a meritorious one, and therefore the defendant ought not to be allowed to make it. The Act, however, does not take away any legal defence which the party may have, because it is not meritorious. I adopt what is said by my Brother Keating to have been the opinion of Williams, J., viz. that when the defendant has

a legal defence, he has a right to offer it, and the Court cannot impose terms. I referred the matter to the Court, because I was told that there was some doubt upon the subject in the profession. (1)

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Rule refused.

Attorney for plaintiffs: *W. A. Crump.*

RE TURNER.

Jan. 24.

Attorney—Suspension from Practice—Practice of the Court.

Where a solicitor has been suspended from practice in Chancery for a given period by the Master of the Rolls, the Courts of Queen's Bench and Exchequer grant a rule to suspend him from practice in those Courts for the like period, which rule makes itself absolute if no cause is shewn, upon an affidavit of the facts and an affidavit of identification. But this Court will only grant a rule nisi, and require all the materials upon which the Master of the Rolls acted to be brought before it, and will extend the period "until the further order of the Court."

A SOLICITOR having been suspended by the Master of the Rolls for a period of ten years from the 2nd of May, 1872, from practising as a solicitor in Chancery, for professional misconduct, the Courts of Queen's Bench and Exchequer (2), upon an affidavit of the facts, and an affidavit of identity, made rules absolute in the first instance to suspend him from practising as an attorney in those Courts respectively for the like period.

Upon application to this Court on the part of the Incorporated Law Society, the Court required all the materials which were before the Master of the Rolls to be brought before them upon affidavit, and granted a rule nisi only.

Garth, Q.C. (Murray with him), moved to make the rule absolute on affidavit of service, no cause being shewn.

(1) See marginal note to the 2nd section of the Act, at p. 385 of Day's Common Law Procedure Acts, 4th Ed., which is as follows: "Defendant shewing a defence upon the merits to have leave to appear."
(2) See *In re M. T.*, Law Rep. 8 Ex. 62.

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BOVILL, C.J. The same result must follow here as in the other Courts. But it is the practice of this Court to add, that the suspension shall continue "until the further order of the Court." We think that a convenient practice, as it gives the Court an opportunity of inquiring what the party's conduct has been in the interim.

KEATING and BRETT, JJ., concurred.

Rule absolute.

Attorney for applicants: *E. W. Williamson.*

Jan. 25.

IN THE MATTER OF G. E. BALL, AN ATTORNEY.

Attorney—Disobedience of a Rule for Payment of Money—Debtors Act, 1869
(32 & 33 Vict. c. 62)—1 & 2 Vict. c. 110, s. 18.

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An attorney having failed to obey a rule of Court by which he was ordered to pay over a sum of money received by him in his character of attorney, the Court refused to order an attachment, upon the common affidavit.

Where the client has elected to take his remedy by a civil proceeding, he must have recourse to an execution under 1 & 2 Vict. c. 110, s. 18, or an application under the Debtors Act, 1869 (32 & 33 Vict. c. 62).

KEMP moved for an attachment against an attorney for disobedience of a rule for the payment of a sum of 61*l.* 3*s.* 6*d.* received by him on account of a client, and costs, upon the usual affidavit that he had been personally served with the rule of Court and the master's allocatur and that the money and costs remained unpaid. He, however, referred to a case of *Re Robinson* (1), in which the Queen's Bench had intimated an opinion that the proper remedy in such a case was by proceeding under the stat. 1 & 2 Vict. c. 110, s. 18. There, as here, an attorney employed to recover a debt received the money, and a rule of Court was obtained ordering him to pay it over, which rule he disobeyed; and the Court refused to grant an attachment. Cockburn, C.J., in the course of the argument, observed,—“The Court has given the applicant the advantage of an order which, by stat. 1 & 2 Vict. c. 110, s. 18,

(1) 10 B. & S. 75.

is equivalent to a judgment in an action; and there is nothing to shew that process against the goods of the party will not be effective. That seems to be the proper course, unless the applicant proceeds against him in *pœnam* or *ex delicto*, by calling upon him to answer the matters in the affidavit." And, after time taken to consider, his Lordship pronounced the following judgment: "We have consulted the judges of the other Courts; and the result (though this is not to be taken as a decision of all the Courts) is, that, where an order for the payment of money is made and disobeyed, the party is deemed to have elected to take his remedy by a civil proceeding, and must proceed by way of execution, as on a judgment, and not by way of attachment: and we see no reason to vary that practice where an attorney is by rule of Court ordered to pay money; the civil remedy will apply in all cases, unless there are special circumstances."

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PER CURIAM. (1) The ordinary affidavit is not sufficient: there must be special circumstances to warrant an attachment for non-payment of money: and this is *à fortiori* since the Debtors Act, 1869 (32 & 33 Vict. c. 62), which abolished imprisonment for debt except in certain cases. (2) It should be shewn that the party has the means of paying and has refused or neglected to do so. There being no special circumstances disclosed upon the affidavit in this case, we must abide by the decision of the Court of Queen's Bench in *Re Robinson*. (3)

Rule refused.

Attorney for applicant: *T. Angell*.

(1) Bovill, C.J., and Keating and Brett, JJ.

(2) One of those excepted cases is, "Default by an attorney or solicitor in payment of costs, when ordered to pay costs for misconduct as such, or in pay-

ment of a sum of money, when ordered to pay the same in his character of an officer of the Court making the order," s. 4.

(3) 10 B & S. 75.

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Jan. 30.

EX PARTE ELIZABETH EAST WHITE.

Acknowledgment by Married Woman under 3 & 4 Wm. 4, c. 74—Documents lost—Duplicate Commission.

A commission for taking the acknowledgment of a married woman at R., a remote part of Victoria, having been returned with a defective affidavit of verification, the documents (with the exception of the deed, which had been executed here by a party entitled to a share of the property in question,) were sent out again by post, and were lost.

The Court allowed a duplicate commission to go, with a fresh affidavit, it appearing that all the parties were still living at R.

IN April, 1871, a commission issued directed to four special commissioners at Rokewood, in Victoria, requiring them, or any two of them, to take the acknowledgment of Elizabeth East White, the wife of W. H. White, of a deed for the conveyance of property in which she had an interest. The commission was returnable on the 1st of May, 1872. The acknowledgment was duly taken on the 14th of July, 1871; but, on the arrival of the documents in this country, the registrar refused to file the certificate of acknowledgment and affidavit of verification, because the latter was sworn before one of the two commissioners who was not authorized to take affidavits. The commission, certificate, and a fresh affidavit were thereupon sent out to Rokewood by post, but they never arrived there.

The deed relating also to another share of the estate thereby conveyed, as well as to the share of Mrs. White, and having been executed by the party to whom the other share belonged, and his share of the purchase-money having been paid to him, the attorney who had the conduct of the business was unwilling to risk the loss of the deed by sending it out again to Rokewood; and, all the parties being still living at Rokewood,

Lumley Smith moved for leave to send out a duplicate commission to the same commissioners, with a new certificate to be signed by the two who had taken Mrs. White's acknowledgment, together with the necessary affidavit, and that the time for returning the commission be enlarged.

PER CURIAM. Under the peculiar circumstances the rule may go, valeat quantum. 1873

Rule absolute.

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Attorneys for applicant: *King & McMillin.*

IN THE MATTER OF AN ACTION IN THE MAYOR'S COURT OF LONDON, BETWEEN
JAY COOKE AND OTHERS, PLAINTIFFS,
HENRY S. GILL AND ANOTHER, DEFENDANTS,
THE UNION BANK OF LONDON, GARNISHEES.

Jan. 21.

*Lord Mayor's Court—Foreign Attachment—Prohibition—"Cause of Action"—
Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.).*

The cause of action,—that is, the whole substantial cause of action,—must arise and the garnishee must reside or carry on business within the city of London, in order to give the Lord Mayor's Court jurisdiction to attach moneys, &c., of the debtor in the hands of a garnishee.

The defendants (who had no residence or place of business in London) drew bills in Philadelphia upon the Union Bank of London, and indorsed them in Philadelphia, and there delivered them to the agents of the plaintiffs, who remitted them to the plaintiffs in London. The drawees refusing to accept the bills, the plaintiffs issued an attachment out of the Lord Mayor's Court to attach moneys of the drawers in the hands of the garnishees, bankers in London:—

Held, that the "cause of action" arose in America and not in London, and consequently that the garnishees were entitled to a prohibition.

Addition to the head-note of *Mayor of London v. Cox* (Law Rep. 2 H. L. 239), by Willes, J.

DOUGLAS WALKER, on behalf of the garnishees, in Michaelmas Term last, obtained a rule calling upon the plaintiffs to shew cause why a writ of prohibition should not issue out of this Court, directed to the Mayor's Court of London, to prohibit all further proceedings in that court against the garnishees upon the foreign attachment issued out of that court in this cause,—on the ground that the cause of action did not arise within the jurisdiction: and the rule prayed for costs. The affidavits upon which the rule was obtained were in substance as follows:—

1. On the 4th of November, 1872, the plaintiffs sued the defendants in the Mayor's Court, London, for an alleged debt of 3012*l.* 10*s.* 4*d.*, and issued process of attachment against The Union Bank of London to attach the moneys of the defendants in

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their hands. [The affidavits further averred the issuing of three other attachments on the 5th, 6th, and 11th of November, 1872, for 4500*l.*, 2500*l.*, and 2100*l.* respectively.]

5. The alleged cause and causes of action, if any, of the plaintiffs against the defendants in the said several actions did not, nor did any or either of them or any part thereof, arise or accrue in the city of London or the liberties thereof, or within the limits of the Mayor's Court, and the same were and are not within the jurisdiction of the said court; but the same all arose in parts beyond the seas, that is to say, in the United States of America, and out of the city of London and liberties and the said limits of the said court; and that no promise to pay had been made or account stated by the defendants within the said city or liberties or the limits of the said court.

6. That, before and at the respective times of bringing the actions and issuing the attachments, and thence hitherto, the defendants were and are citizens of the United States of America, residing and carrying on business at Philadelphia, and having no residence or place of business in the city of London or in the United Kingdom; that the plaintiffs are also citizens of the United States, and carrying on business there; and that their alleged claims against the defendants in the actions arise upon bills of exchange drawn by the defendants at Philadelphia upon The Union Bank of London (who have refused acceptance of the same) and indorsed and delivered by the defendants to the plaintiffs at Philadelphia.

7. That on the 12th of November, 1872, the attorneys for the garnishees wrote to the plaintiffs' attorneys, as follows:—"These four attachments are open to the objection we took to the first attachment issued, and since withdrawn by you, viz. want of jurisdiction in the Mayor's Court, both on the ground that the defendants are foreigners, and that the cause of action arose abroad. Our clients feel aggrieved that they should be put to expense and trouble by proceedings being instituted in the Mayor's Court in cases where it clearly has no jurisdiction; more especially after your attention had been called to the point, and you had admitted the force of the objection by withdrawing the first attachment. We are, therefore, again instructed to give you

notice that, unless these attachments are forthwith withdrawn, rules for writs of prohibition will be applied for, and costs will be asked for against the plaintiffs."

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Gates shewed cause upon affidavits which in substance stated that the plaintiffs carry on business in co-partnership at No. 41, Lombard Street, in the city of London, under the style or firm of "Jay Cooke, McCulloch, & Co.," and do not carry on business together in the United States, as alleged, nor are all the members of the co-partnership citizens of the United States, but two of them are British subjects resident in this country; that the actions were brought by the plaintiffs as indorsees of several bills of exchange against the defendants as drawers and indorsers; that the bills came into the hands of the plaintiffs at their bank in London about the end of October, 1872, and were presented at The Union Bank of London, within the jurisdiction of the Mayor's Court, for acceptance and payment, but the said bank refused to accept or pay the same; that, by the refusal of the bank to accept, a breach of the defendants' contract as drawers and indorsers of the bills had taken place in this country within the jurisdiction of the Mayor's Court, and a cause of action had accrued in respect thereof; and that the first attachment was withdrawn solely on account of a mistake in the names of the parties in the first action.

A material part of the cause of action, viz. the receipt of the bills by the plaintiffs, their presentment to the drawees, and the refusal of acceptance or payment, took place within the city of London. In the notes to *Peacock v. Bell* in 1 Notes to Saund. Rep. at p. 99, n. (3), it is said that, "in actions in inferior courts, it is necessary that every part of that which is the gist and substance of the action should appear to be within their jurisdiction." It is enough, therefore, if the contract is to be performed within the jurisdiction. "Cause of action" does not necessarily mean the whole cause of action; but the act on the part of the defendant which gives the plaintiff his cause of complaint—*Jackson v. Spittal* (1),—in this case, the failure to pay the bills on the default of the drawees. The indorsement was not complete until

(1) Law Rep. 5 C. P. 542.

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the bills reached the hands of the plaintiffs in London: *Chapman v. Cottrell*. (1)

[BOVILL, C. J. This being a proceeding in an inferior court, it is necessary to shew that every material fact took place within the jurisdiction of the court: 1 Ch. Pl., 7th ed. 287.

KEATING, J. In the copy of the Law Reports in this Court, I find in the hand-writing of my late Brother Willes the following addition to the head-note to *Mayor of London v. Cox* (2):—"The cause of action must arise *and* the garnishee reside within the city, in order to give the Lord Mayor's Court jurisdiction." We have repeatedly held since that that means substantially the whole cause of action.

BRETT, J. In *Banque de Credit Commercial v. De Gas* (3), bills of exchange were drawn and accepted abroad, and indorsed by the defendant abroad, one of them being payable in London, the others in Liverpool. The plaintiffs, foreign bankers, having no residence or place of business in London, as indorsees of the bills sued the defendant (who likewise had no residence or place of business in London) in the Mayor's Court, and attached moneys of his in the hands of the garnishee, a banker in London; and this Court made absolute a rule for a prohibition; holding, upon the authority of *Mayor of London v. Cox* (2), that the Mayor's Court had no jurisdiction, the cause of action not arising within the city, and the parties to the suit being both resident abroad.]

Formerly the declaration in the Mayor's Court was general; but, in deference to the decision of the House of Lords, the modern form contains the words "and within the jurisdiction of this court:" Brandon's Pr. of Mayor's Court, ed. 1871, p. 66. Sect. 15 of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), enacts that "no defendant shall be permitted to object to the jurisdiction of the court in or by any proceeding whatsoever except by plea:" and s. 12 enacts that, "where the debt or damage claimed in any action shall not exceed the sum of 50*l.*, no plea to the jurisdiction shall be allowed, provided the defendant or one of the defendants shall dwell or carry on business within the city of London or the liberties thereof at the time of the action

(1) 3 H. & C. 865; 34 L. J. (Ex.)
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(2) Law Rep. 2 H. L. 239.

(3) Law Rep. 6 C. P. 142.

brought, or provided the defendant or one of the defendants shall have dwelt or carried on business at some time within six months next before the time of the action brought, or if the cause of action, *either wholly or in part*, arose therein." If, therefore, the defendants themselves had been here, they would have to plead that the cause of action *and every part thereof* accrued dehors the jurisdiction. It can hardly be that the Mayor's Court has jurisdiction over the defendants and not as against the garnishee. This particular point was not brought before the Court or the House of Lords in *Cox v. Mayor of London*. (1)

[BOVILL, C.J. It may be that the inferior court may acquire jurisdiction as against a defendant, by his own default. But here there has been no default.]

The mere fact that some part of the cause of action arose out of the city of London does not oust the jurisdiction of the court.

[BRETT, J. Your contention must be that, if there be a breach in the city of a contract made, say in America, the Mayor's Court has jurisdiction.]

The non-payment of these bills by the bank in London upon which they are drawn, is a matter cognizable in the Mayor's Court.

Douglas Walker, in support of the rule. No part of the cause of action in this case arose in London. The bills were drawn and accepted in Philadelphia, and delivered to the plaintiffs' agents in Philadelphia, and they were never accepted.

[BRETT, J. The argument on the other side is that, if any one material fact arises within the city, it is enough to give the Mayor's Court jurisdiction; and that the presentment and refusal to accept were material to charge the drawers and indorsers.]

The contract of the drawer is, not that the drawee shall accept or pay the bill, but that he (the drawer) will pay it if the drawee makes default; and no part of that contract in the present case arose in London. The whole of the opinion of Willes, J., in *Mayor of London v. Cox* (2) is based upon the assumption that the Mayor's Court is an inferior court.

[BRETT, J. In that case Willes, J., says (3): "In *Reg. v. Mayor of*

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(1) 1 H. & C. 338; 32 L. J. (Ex.)
64; 2 H. & C. 401; 32 L. J. (Ex.)
282; Law Rep. 2 H. L. 239.

(2) Law Rep. 2 H. L. at p. 252.

(3) Law Rep. 2 H. L. at p. 256.

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London (1), upon a mandamus to admit an attorney to the Mayor's Court, as being an 'inferior court' within the Attorneys' Act; it was, after some hesitation in the Queen's Bench (2), fully admitted in the Exchequer Chamber (3) by the counsel for the city (the present distinguished Recorder) that the court was an inferior court. It was so decided to be by the Court of Queen's Bench, Lord Denman (who had been Common Sergeant) stating, in delivering the judgment of the Court,—‘A great many authorities have been cited shewing peculiar practice and peculiar jurisdiction in the Mayor's Court, but none shewing that it did not come within that class of courts called inferior. Its jurisdiction is limited; the cause of action must be alleged to have accrued within it.’” In the course of the argument of Mr. Gurney in that case, Wightman, J., asks (2), “What constitutes an inferior court?” Getting no reply, he further asks: “In pleadings in the Lord Mayor's Court, are facts averred to have taken place within the jurisdiction?” To this the counsel replies, “It has never been laid down that that conclusively shews a court to be inferior.” In proceedings in the Passage Court of Liverpool, before 16 & 17 Vict. c. xxi, it was necessary to aver that every material fact arose within the jurisdiction.]

At p. 259 of the judgment, the learned judge, commenting upon the case of *Manning v. Farquharson* (4), observes that s. 15 of the Mayor's Court Act does not affect the garnishee.

BOVILL, C.J. No doubt it had long been the practice down to the passing of the Mayor's Court of London Procedure Act, 1857, to frame the proceedings in the Lord Mayor's Court, whether affidavits of debt, declarations, or other pleadings, without alleging that the facts giving rise to the action occurred within the jurisdiction of the court. The point came under the consideration of this Court more than fifty years ago, in a case of *Banks v. Self* (5), when it was held not to be necessary to aver that the defendant was indebted to the plaintiff within the jurisdiction; the Court observing “that the uniform course of pleading had been so ever

(1) 13 Q. B. 1.

3) 13 Q. B. at p. 40.

(2) 13 Q. B. at p. 17.

(4) 30 L. J. (Q.B.) 22.

(5) 5 Taunt. 234, n.

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since the time of the Year Books, Edw. 4; and it was too much to ask them to overthrow so uniform a practice, without citing so much as a single applicable case in favour of that request." So far, therefore, as the form of the pleadings is concerned, it was not usual or necessary to aver that the cause of action arose within the jurisdiction. From that and from certain expressions to be found in the books, an argument has been raised as to whether or not it was necessary to *prove* that every material fact arose within the jurisdiction. The matter was very much discussed in *De Haber v. The Queen of Portugal* (1), where Lord Campbell delivered an elaborate judgment, in the course of which he says (2): "The circumstance that the cause of action, if there were any, arose out of the jurisdiction of the Lord Mayor's Court, need not be relied on. Nevertheless, after the strong assertions at the Bar that this is material where the defendant does not appear, we think it right to say that, having examined the authorities, we entertain no doubt that the process of foreign attachment can only be duly resorted to where the cause of action arose within the jurisdiction of the court from which it issues." I was counsel in that case, and in several others of the same kind which occurred about that time. The matter was subsequently considered in *Westoby v. Day* (3), where Lord Campbell, delivering the judgment of the Court, said: "In the recent case of *De Haber v. The Queen of Portugal* (1), we expressed an opinion that 'the process of foreign attachment can only be resorted to when the cause of action arose within the jurisdiction of the court from which it issues.' But we said, 'The garnishee is safe by paying under the judgment of the court;' adding, 'The objection that the cause of action did not arise within the jurisdiction of the court, *if properly taken*, must prevail.'" That judgment is explained by Montague Smith, J., in *Matthey v. Wiseman*. (4) Here, the objection is properly taken, viz. by a rule for a prohibition, and by the garnishee. The Lord Mayor's Court is clearly a court of inferior jurisdiction, and is subject to the general rules applicable to courts of that description, except in so far as it is exempted therefrom by usage or by

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(1) 17 Q. B. 171; 20 L. J. (Q.B.) 488. (3) 2 E. & B. 605, at p. 620; 22

(2) 17 Q. B. at p. 213. L. J. (Q.B.) 418. 1874 13

(4) 18 C. B. (N.S.) 657, at p. 673; 34 L. J. (C.T.) 216. 11/Jan 185603-8

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statute. In Chitty on Pleading, 7th ed. 287, the rule is thus laid down: "In inferior courts, it continues necessary, in addition to the statement of a county as a venue, to aver that every material fact took place 'within the jurisdiction of the court,' as, in assumpsit, as well that the promise or contract was made as that the goods were sold or the money had and received, &c., within the jurisdiction of the court; and, if the allegation be omitted, the declaration will be insufficient even after verdict." And numerous decisions as to what are facts material to be so averred are to be found in Comyns's Digest, Courts (P. 9). The same rule, in substance, is laid down in the notes to *Peacock v. Bell*, in 1 Notes to Saund. Rep. at p. 99, n. (3), where many authorities are referred to. And, although a general form of affidavit and declaration were formerly allowed, yet, when it came to the evidence, it was always necessary to prove that the gist and substance of the cause of action occurred within the jurisdiction. Here, all the material facts which constitute the cause of action occurred beyond the jurisdiction of the Mayor's Court. Independently, therefore, of the recent Act, that court had no jurisdiction over this contract or the parties thereto. Does, then, the 20 & 21 Vict. c. clvii. affect the garnishee? Sect. 15 enacts that "no *defendant* shall be permitted to object to the jurisdiction of the court in or by any proceeding whatsoever except by plea." That section is in terms confined to the defendant. But a writ of prohibition may be applied for by the garnishee, or even by a stranger. That is settled by *De Haber v. The Queen of Portugal* (1) and *Mayor of London v. Cox*. (2) Then, s. 12 enacts that, "where the debt or damage claimed in any action shall not exceed the sum of 50*l.*, no plea to the jurisdiction shall be allowed, provided the defendant or one of the defendants shall dwell or carry on business within the city of London or the liberties thereof at the time of the action brought, or provided the defendant or one of the defendants shall have dwelt or carried on business at some time within six months next before the time of the action brought, or if the cause of action, either wholly or in part, arose therein." That is a still further limitation of the action of the defendant to challenge the jurisdiction. The effect of the statute is merely to prevent the

(1) 17 Q. B. 171; 20 L. J. (Q. B.) 488.

(2) Law Rep. 2 H. L. 239.

defendant from objecting to the jurisdiction otherwise than by plea. There is nothing in it to interfere with the right of the garnishee or a stranger to come to this Court for a prohibition. As against them the process of attachment can only go where every material fact which constitutes the cause of action arose within the jurisdiction of the Mayor's Court. I think the rule for a prohibition must be made absolute; and, as the plaintiffs have thought fit to make the experiment, it will be absolute with costs.

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KEATING, J. I am entirely of the same opinion. The way in which Mr. Gates put the case was this, that, because the statute precludes the defendant from disputing the jurisdiction of the Mayor's Court except by plea, the Court ought to be governed by the same rule in granting a prohibition. Before the passing of the Act, it is clear,—and for that no authority need be cited,—that, whatever the course of pleading was, every material fact constituting the cause of action must have been proved to have occurred within the jurisdiction of the Mayor's Court, as in the case of every other court of inferior jurisdiction. The real question is whether that has been altered by the Act of Parliament. Sect. 12 is a somewhat extraordinary one. It applies only to cases under 50*l.*, and is binding only in its terms. In terms it is confined to the defendant, and does not apply to the garnishee. The object is to compel the defendant to appear. This is an application by the garnishees; and we are bound to decide upon it as if the Act had not passed. That is established by *Mayor of London v. Cox*. (1) It was certainly the opinion of Willes, J., whose able judgment in that case, which was prepared with great care, distinctly and decidedly lays it down that the two sections referred to do not extend to a garnishee or to a stranger who comes for a prohibition. In that opinion I entirely concur. I think the prohibition should go.

BRETT, J. In this case the claim of the plaintiffs in the Mayor's Court was for a much larger sum than 50*l.* To maintain that claim,—the action being brought against the defendants as the drawers and indorsers of several bills of exchange,—it would be necessary to prove that the defendants drew and indorsed the bills,

(1) Law Rep. 2 H. L. 239.

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that they were presented to the drawees for acceptance, that acceptance was refused, and that the defendants had notice of such refusal. The bills were drawn in America. Probably the indorsement and delivery also took place in America. They were to be presented for acceptance in London. I take it, therefore, that some material facts arose in America, and some in London. The question is, whether under such circumstances the plaintiffs are entitled to attach moneys of the defendants in the hands of the garnishees. According to the addition made by Willes, J., to the head-note to *Mayor of London v. Cox* (1), it seems to have been the opinion of that very learned judge that the *cause* of action must arise *and* the garnishee reside within the city, in order to give the Lord Mayor's Court jurisdiction. What is the meaning of that? Beyond question the Mayor's Court is a court of inferior jurisdiction. In the judgment in that case Willes, J., points out that it had been so decided in *Reg. v. Mayor of London* (2) and *De Haber v. The Queen of Portugal* (3), and that it is subject to all the rules with regard to inferior courts. That being so, independently of the Act, every material fact must have arisen within the jurisdiction to entitle the Mayor's Court to entertain the suit. "Cause of action" has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed,—every fact which the defendant would have a right to traverse. If that be the general rule, has the Act of Parliament made any difference in this respect? Now, the first thing to be observed with reference to the case of *Mayor of London v. Cox* (1) is, that the objection may be taken before any pleading at all. The decision was that, though by the Act, as between the plaintiff and the defendant, if the defendant appears, he can only plead in a particular way; yet, where a prohibition is moved for in a superior Court either by the garnishee or a stranger, it may be moved for before plea, and the application is to be determined by the ordinary principles of the common law. It follows, therefore, that the Courts will grant a prohibition unless the cause of action is shewn to have arisen within the jurisdiction of the Mayor's Court. That principle was endeavoured to be stated by Montague Smith, J., and myself in the

(1) Law Rep. 2 H. L. 239.

(2) 13 Q. B. 1.

(3) 17 Q. B. 171; 20 L. J. (Q.B.) 488.

case of *Banque de Cr dit Commercial v. De Gas*. (1) Montague Smith, J., there says: "The Lord Mayor's Court, as a local court, has no jurisdiction in matters which do not arise within the city of London. That is the general principle upon which the decision of the House of Lords in *Mayor of London v. Cox* (2) is founded; and it embraces every description of action, including actions on bills of exchange. (3) In the present case, it appears that neither the plaintiffs nor the defendant reside in London; and, further, that the cause of action did not arise wholly within the city of London. The case, therefore, is clearly governed by *Mayor of London v. Cox*. (2) It would be idle, after the full discussion the question of jurisdiction of the Mayor's Court underwent in that case before the highest tribunal of the country, for this Court to entertain the matter again." In the course of the argument in that case, I am reported to have said (4): "To entitle the plaintiff to an attachment, two things must concur, viz. that the cause of action, that is, the whole cause of action, arose within the city, and that the person in whose hands the money or the goods are attached, the garnishee, as he is called, resides within the city." I substantially said the same in giving my judgment: and I still adhere to the opinion I then expressed. I believe that to be the meaning of Willes, J., in the MS. note referred to; and I have heard him say so very many times since. I think that is the right rule. Therefore, where the question does not arise between the plaintiff and a defendant who has appeared, but between the plaintiff and the garnishee, or between the plaintiff and a stranger, the jurisdiction to issue an attachment does not exist unless every fact material to establish a cause of action accrued within the city.

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Rule absolute. (5)

Attorneys for plaintiffs: *Janson, Cobb, & Pearson*.

Attorneys for garnishees: *Lyne & Holman*.

(1) Law Rep. 6 C. P. 142.

actions upon bills of exchange were
excepted out of the general rule.

(2) Law Rep. 2 H. L. 239.

(3) It had been contended that (4) Law Rep. 6 C. P. at p. 143.

(5) See next case.

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Jan. 30.

IN THE MATTER OF AN ACTION IN THE MAYOR'S COURT OF LONDON,

BETWEEN

FREDERICK WHINNEY, OFFICIAL LIQUIDATOR OF THE LONDON, HAMBURGH,
AND CONTINENTAL EXCHANGE BANK, LIMITED, PLAINTIFF,

HANS CHRISTIAN SCHMIDT, DEFENDANT,

THE LONDON AND WESTMINSTER BANK, GARNISHEES.

3C7D230

Lord Mayor's Court—Foreign Attachment—Declaring in Prohibition.

The plaintiffs attached by process in the Lord Mayor's Court money of the defendants in the hands of the garnishees. A rule nisi was obtained for a writ of prohibition, on the ground that the action was brought to recover calls in a public company in course of winding up, under an order made by the Master of the Rolls out of the jurisdiction of the Lord Mayor's Court, and that the defendant was a foreigner having no residence or place of business in England. Cause was shewn upon an affidavit stating that the contract for the purchase of the shares was made in London, and that the defendant carried on a large banking business through the garnishees as his agents in the city of London.

The plaintiffs being desirous of questioning the decision in *Cooke v. Gill* (ante, p. 107), the rule was enlarged upon their undertaking to declare in prohibition.

PHILBRICK, on behalf of the garnishees, obtained a rule calling upon the plaintiff to shew cause why a writ of prohibition should not issue out of this Court, directed to the Mayor's Court of London, to prohibit all further proceedings in that court against the garnishees upon the foreign attachment issued out of that court in this cause,—on the ground that the cause of action did not arise within the jurisdiction.

The affidavit upon which the rule was obtained, stated, amongst other things, that the action was brought in respect of a cause of action which did not arise within the jurisdiction of the Mayor's Court, London; that it was brought in respect of an alleged non-payment of calls upon shares, and interest thereon, in the London, Hamburg, and Continental Exchange Bank, Limited; that the ground on which it was alleged that the defendant took the shares and became liable to such calls, was under certain letters written and signed by him in Hamburg, out of the jurisdiction of the Mayor's Court; that no contract was ever entered into or made in this country, within the jurisdiction of the Mayor's Court, to take such shares or to pay such calls; that such liability had been resisted by the defendant in the Court of Commerce in Hamburg;

and that the defendant was at the time of the commencement of the action, and for some time previously had been, and still was, resident and domiciled in Hamburg, within the empire of Germany, where he carried on his business, and did not reside and had no place of business in London, or within the jurisdiction of the Mayor's Court.

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Field, Q.C., and *Talfourd Salter*, shewed cause, upon an affidavit stating in substance that the London, Hamburg, and Continental Exchange Bank, Limited, was a company registered under the Companies Act, 1862 (1), with limited liability, and that the registered office thereof was at 79, Lombard street, in the city of London, and within the jurisdiction of the Lord Mayor's Court; that the defendant was an original allottee of fifty shares, thirty of which were subsequently transferred by him, and became by transfer the holder of 115 additional shares, making a total of 135 shares, for which he was duly settled on the list of contributories by the Master of the Rolls; that he was one of the London directors of the company; that by art. 9 of the articles of association of the company it was provided that an application for shares signed by or on behalf of the applicant, and followed by an allotment, should be deemed to be an acceptance of such shares entitling the company to place the name of the allottee on the register; that by another article it was provided that, as to any member whose registered place of abode should not be in the United Kingdom, the office should, as regards the service of notices or other documents, be deemed his registered place of abode in the United Kingdom; that by another article it was provided, that, on the trial or hearing of any action or suit to be brought by the company against any member to recover any debt due for any call, it should be sufficient to prove that the name of the defendant is on the register as a holder of the shares, and that notice of the call was duly given; that the shares standing in the name of the defendant by transfer were purchased by or on behalf of the defendant on the Stock Exchange or elsewhere within the city of London and the jurisdiction of the Lord Mayor's Court, and the transfers were taken by or on behalf of the defendant to

(1) 25 & 26 Vict. c. 89.

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the office of the company, and then registered there; that the London and Westminster Bank are the agents of the defendant, through whom he transacts in London and within the jurisdiction of the Mayor's Court, a large banking business; and that by an order of the Master of the Rolls dated the 11th of January instant, it was ordered that the plaintiff be at liberty to continue the attachment.

[BOVILL, C.J. To enable the plaintiff successfully to resist a prohibition, he must shew that every material fact essential to constitute a cause of action occurred within the jurisdiction of the Mayor's Court. That was established so long ago as the case of *De Haber v. Queen of Portugal* (1), and again in this term in *Cooke v. Gill*. (2) Here, the call was made out of the jurisdiction.]

The contract for the purchase of the shares was made in the city of London, and the allotment took place there.

BOVILL, C.J. The liability of the contributory arises from the making of the call. The declaration would be bad without averring the order of the Master of the Rolls. If the parties desire to question our recent decision, the rule may be enlarged, with liberty to the plaintiffs to declare in prohibition; otherwise it will be absolute with costs.

KEATING, GROVE, and HONYMAN, JJ., concurred.

Rule accordingly.

Attorneys for plaintiffs: *Ashley & Fox.*

Attorney for garnishees: *Orton.*

(1) 17 Q. B. 171; 20 L. J. (Q.B.) 488.

(2) Ante, p. 107.

BAKER v. CLARK.

Lord Mayor's Court—Foreign Attachment—Prohibition not grantable to the Defendant in the Suit—Mayor's Court Act, 1857 (20 & 21 Vict. c. clvii.), s. 15.

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The defendant in the suit in the Lord Mayor's Court cannot move for a writ of prohibition, to stay the proceedings in a foreign attachment.

WILDEY WRIGHT, on behalf of the defendant, moved for a writ of prohibition directed to the Mayor's Court of London, to prohibit all further proceedings in that court against the defendant, on the ground that the cause of action did not arise within the jurisdiction.

[*KEATING, J.* Sect. 15 of the Mayor's Court Act, 1857 (20 & 21 Vict. c. clvii.), expressly enacts that "no defendant shall be permitted to object to the jurisdiction of the Court in or by any proceeding whatsoever except by plea."]

The difficulty is that, if the defendant pleads to the jurisdiction, he is precluded from setting up any other defence; and here part of the debt is admitted.

BOVILL, C.J. You cannot get over the express enactment in the Mayor's Court Act. The defendant cannot have a prohibition.

KEATING, J. There can be no difficulty in framing the motion so as to get over the objection.

GROVE and HONYMAN, JJ., concurred.

Rule refused. (1)

Attorneys for defendant: *Piesse & Son.*

(1) The application was renewed on the following day in the name of a stranger, and a rule was granted.

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BURSLEM v. ATTENBOROUGH.

Jan. 30.

Pledge of Goods—Pawnbrokers Act (39 & 40 Geo. 3, c. 99), ss. 15, 16—Loss of Pawn Ticket—Right to redeem.

The 16th section of the 39 & 40 Geo. 3, c. 99, provided that in case the pawn-ticket for goods pledged were lost, mislaid, destroyed, or fraudulently obtained from the owner thereof, and the goods remained unredeemed, the pawnbroker should, at the request of the person claiming to be the owner of the goods, deliver to such person a copy of the ticket and a form of affidavit (now a declaration) stating the circumstances, and the person having obtained such copy and form of affidavit should thereupon prove his property in such goods to the satisfaction of a justice of the peace, and should verify on oath or affirmation before the said justice the truth of the particular circumstances attending the case mentioned in the said affidavit, "whereupon" the pawnbroker should suffer the person so proving such property to the satisfaction of such justice as aforesaid, and making such affidavit or affirmation as aforesaid, on leaving the copy of the ticket and the affidavit with the pawnbroker, to redeem such goods and chattels:—

Held, that where a person having lost the ticket for goods pledged by him had, in accordance with the section, procured from the pawnbroker a copy of the original ticket and a form of declaration, proceeded with the same before the magistrate, and having proved his title before him, straightway returned to the pawnbroker, and showed him the declaration which he had made, he was not bound to redeem the goods immediately, but might redeem them at any time at which he might have redeemed them if he still held the original ticket, and that the pawnbroker was not justified in the meanwhile in delivering the goods to a person producing the original ticket.

DECLARATION: trover for three rings.

Pleas 1, not guilty; 2, not guilty by statute; 3, not possessed; 4, leave and licence.

Issues.

At the trial before Grove, J., at the sittings in Middlesex during Trinity Term, the facts, so far as now material, appeared to be as follows:—

The plaintiff had pledged three rings with the defendant, a pawnbroker, and duly received tickets for them. Plaintiff had had some transactions with one Braithwaite, in consequence of which the latter had incurred pecuniary liability to him, and it was arranged between them that the plaintiff should hand over to Braithwaite the tickets for some articles, other than the rings in question, which the plaintiff had pledged, that Braithwaite might pay the interest due on such pledges, which pay-

ments were to go in discharge of Braithwaite's liability to the plaintiff. When handing over the tickets in pursuance of this arrangement the plaintiff, by mistake, gave to Braithwaite the tickets for the three rings which were in the same bundle with the others. Braithwaite subsequently absconded. Some time after, in the month of October, missing the tickets, the plaintiff went to the defendant, the pawnbroker, and on stating the circumstances received from him the copies of the tickets and the statutory declarations required under such circumstances by 39 & 40 Geo. 3, c. 99 s. 16. He then went before a magistrate, as required by that section, and made the declarations. He afterwards, during October, came and shewed the declarations to the pawnbroker, but retained them in his own possession, not redeeming the rings or renewing the pledge upon them. In February, 1871, the original tickets were produced to the defendant's assistant by a person who claimed to be the owner thereof, and required delivery of the rings, which were accordingly delivered to him. The plaintiff afterwards came to the pawnbroker and producing the declarations, claimed to redeem the rings. On these facts the verdict was entered for the plaintiff for 33*l.*, the value of the rings, leave being reserved to the defendant to move to enter a nonsuit on the ground that the plaintiff was not entitled to recover upon the true construction of the 15th and 16th sections of 39 & 40 Geo. 3, c. 99. A rule nisi had been accordingly obtained, against which

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B. Francis Williams, and *Reid*, shewed cause. There was clearly a losing or mislaying of the tickets in this case within the meaning of the 16th sect. of 39 & 40 Geo. 3, c. 99. The plaintiff gave them to Braithwaite by mistake, and when he discovered the mistake he was unable to find Braithwaite. After discovering the loss he gives notice to the pawnbroker that he is the true owner, and proves his title in the manner pointed out by the section.

Upon so doing, by the terms of the Act he is to be regarded as the true owner, and the pawnbroker is not entitled to give the goods up to the producer of the original ticket. The plaintiff came back and shewed the defendant the declarations which he had made in conformity with the 16th section. He was not obliged to

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leave them with the pawnbroker then, for they are his documents of title, nor was he obliged to redeem the goods immediately.]

Giffard, Q.C., and *Francis Turner*, supported the rule. The mode in which these tickets got into Braithwaite's hands was not a loss or mislaying within the 16th section of the Pawnbrokers Act. The plaintiff himself parted with the tickets. He gave Braithwaite a bundle of tickets, not knowing, no doubt, that these tickets were among them; but it did not appear that Braithwaite would not assume that he was intended to have them for the same purpose as the others. There is nothing but a misunderstanding between them as to what tickets were to be included in the arrangement between them, which arose from the plaintiff's own default.

[BOVILL, C.J. But if the plaintiff cannot, on discovering the mistake, find Braithwaite to get the tickets back, why is there not a loss within the Act?]

Secondly, the plaintiff was entitled to redeem the pledge immediately upon making the declaration required by the 16th section and leaving it with the pawnbroker; but he cannot hold the declaration over, and leave the pawnbroker without any protection in the meanwhile against the original ticket. The declaration is to be the pawnbroker's protection. The words of the section are: "Whereupon the pawnbroker shall suffer the person or persons making such affidavit as aforesaid, on leaving the said affidavit with the said pawnbroker, to redeem such goods and chattels."

The word "whereupon" imports that the goods must be redeemed immediately.

[GROVE, J. Does it not only mean "the preceding requirements of the section having been complied with"?]

According to that construction of the section, the pawnbroker might be placed in a situation of the greatest difficulty. He has no means of knowing whether the person coming and procuring the copy of the ticket and the form of declaration has ever proceeded before the magistrate and made the declaration. Is it reasonable that the pawner should come down upon him six months after, and produce the declaration, and claim to redeem the goods? What is he to do if in the meantime the original ticket is produced? The proper course, if the pawner wishes the goods still to

remain in pawn, is to repledge and have a fresh ticket, leaving the declaration with the pawnbroker. The word "thereupon," in the same section, has been made the subject of judicial interpretation in *Vaughan v. Watt*. (1) That case is a strong authority in favour of the construction the defendant seeks to put on the word "whereupon."

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BOVILL, C.J. The provisions in the Pawnbrokers Act to which our attention has been called are provisions for the benefit of the pawnbroker, and for his protection from difficulties arising out of conflicting claims. By the 15th section the pawn ticket is given a character analogous to that of a negotiable instrument, and the pawnbroker is required to deliver the goods pledged to the party presenting it, and is indemnified in so doing unless the case is brought within the terms of the 16th section. The words are "unless the real owner or owners thereof proceeds or proceed in manner hereinafter provided and directed for the redeeming of goods and chattels pledged where such note hath been lost, mislaid, destroyed, or fraudulently obtained from the owner or owners thereof." It does not appear to me that this amounts to saying, "unless the real owner actually redeems in pursuance of section 16," but, "unless he takes the steps pointed out by section 16 in order to entitle him to redeem."

If this were not so, it appears to me that the effect would be to diminish the protection intended to be given to the pawnbroker, or else to impose hardship upon the pawner, who would be deprived of his right to redeem the goods at any time within the year. The 16th section provides that in case the ticket be lost mislaid, destroyed, or fraudulently obtained from the owner or owners thereof, and the goods remain unredeemed, the pawnbroker shall, at the request of the person claiming to be the owner of the goods, deliver to such person a copy of the ticket and a form of affidavit stating the circumstances. And the person having obtained such copy and form of affidavit "shall thereupon prove his property in such goods and chattels to the satisfaction of some justice of the peace, &c., and shall verify on oath or affirmation before the said justice the truth of the particular circumstances

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attending the case mentioned in the affidavit; the caption of such oath or affirmation to be authenticated by the handwriting thereto of the justice," &c.

It was argued that in the present case there was no losing or mislaying within the terms of the section. It seems to me that the case is clearly one within the section. That being so, the plaintiff did apply to the defendant, in pursuance of the section, for copies of the tickets and forms of declaration, which were delivered to him, and he then proceeded before the magistrate, and having complied with the other requirements of the section, he subsequently returned and shewed the pawnbroker the declarations he had made. It may well be that these proceedings must be taken and brought to the pawnbroker's notice at once, for otherwise the pawnbroker would probably be entitled to presume that they had not been taken. After providing for the protection of the pawnbroker that the magistrate shall authenticate the affidavit by his signature, the section then proceeds: "Whereupon the pawnbroker shall suffer the person or persons proving such property to the satisfaction of such justice as aforesaid, and making such affidavit or affirmation as aforesaid, on leaving such copy of the said note or memorandum and the said affidavit with the said pawnbroker, to redeem such goods and chattels." It appears to me that the word "whereupon" must be construed as meaning upon compliance with the requirements of the section, and cannot be construed as suggested on behalf of the defendant. By the other provisions of the Act, the person pledging is to have a year within which to redeem the pledge. Nothing in the 16th section appears to me to indicate any intention of abridging this period. I do not see any necessity for so doing; the pawnbroker has proof, authenticated by the signature of the magistrate, that the particular person is the owner of the goods, and when such proof has been given to him he can only deliver the goods to the person making the declaration, and is protected by the statute in so doing. Any difficulty arising from the word "whereupon" in the 16th section is now removed by the 35 & 36 Vict. c. 93, which has made fresh provision for these cases; but it appears to me that the plaintiff having complied with the provision of the 16th section by immediately going before the magistrate and

making the necessary declarations, and having immediately communicated the fact that he had done so to the pawnbroker, the latter was not justified in delivering up the rings to another person, and this action is maintainable. The rule must therefore be discharged.

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KEATING, J. I am of the same opinion, though I think there certainly is some ambiguity in the section. It seems to me, in the first place, clear that there was a loss or mislaying of the ticket within the meaning of the Act. In case of such loss the person entitled to the goods is to go to the pawnbroker and procure a copy of the ticket and a form of declaration, and thereupon to go before the magistrate and make the declaration. I am prepared to hold that he must do this promptly. Such was held to be the effect of the word "thereupon" in the case of *Vaughan v. Watt* (1), which was referred to in the course of the argument.

Then it was argued by Mr. Giffard that the section would be defective according to the construction sought to be put upon it by the plaintiff, inasmuch as the pawnbroker might be left in ignorance whether the necessary steps had been taken. The Act of last session appears to have removed that difficulty, but even under the old Act if the party obtaining the form of declaration did not communicate with the pawnbroker and left him in ignorance whether he had made the declaration or not, I should be prepared to hold that he had not fulfilled the requirements of the Act. The legislature could not have intended to place the pawnbroker in the difficulty of not knowing what had been done with respect to the declaration and yet being liable to be affected by it. This point does not arise in the present case. Everything has been done by the plaintiff to bring him within the terms of the section. He went promptly to the magistrate, and immediately returned to the pawnbroker and shewed him the declarations. After that the pawnbroker was not, in my opinion, justified in parting with the rings to another person.

GROVE, J. I also think the rule should be discharged. I am clearly of opinion that the tickets in this case were lost or mislaid

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within the meaning of the section. Then, with respect to the second point, the question is whether a party, who has obtained the copy ticket and declaration provided for by the section from the pawnbroker, and has immediately proceeded before the magistrate and having made the declaration before him returned to the pawnbroker and shewn it to him authenticated by the magistrate's signature, must redeem the goods immediately, and is prevented from leaving them any longer in pawn. There does not appear to be any provision to that effect in the statute. The loss of the pawn-ticket might occur within a week from the time when the articles were pawned; can it be contended that the meaning is, that a person who is obviously short of money from the fact of his pawning the goods at all, must find the money to redeem immediately or leave the goods at the mercy of the pawnbroker? What might have been the case if the plaintiff had not returned to the pawnbroker at all after procuring the declaration, and had left him in ignorance of the steps he had taken, it is not now necessary to decide.

HONYMAN, J. I have arrived at the same conclusion as the rest of the Court, though not without some little doubt. The pawnbroker would obviously be placed in a position of great difficulty if after the pawner had obtained the declaration from him and gone before the magistrate he were to be left in ignorance of what had been done and the pawner might nevertheless come and claim to redeem at any time. It is true that no such difficulty arises in the present case, but I am not clear that it might not in other cases upon the construction of the section adopted by the Court.

Rule discharged.

Attorney for plaintiff: *Ashwin.*

Attorney for defendant: *Neate.*

IN THE MATTER OF AN ACTION IN THE MAYOR'S COURT OF LONDON, BETWEEN
LEBEAU AND ANOTHER AND THE GENERAL STEAM NAVIGATION CO.

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Jan. 31.

*Lord Mayor's Court, London—Prohibition—New Trial in the Mayor's Court
after a Rule for a Nonsuit made absolute in a Superior Court.*

Notwithstanding s. 10 of the Mayor's Court London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), this Court has no power to prohibit the Lord Mayor's Court from proceeding to re-try an action there, after a rule absolute for a nonsuit in this Court upon a point reserved.

ACTION in the Mayor's Court, London. At the trial a verdict was found for the plaintiffs for 18*l.* 11*s.* 1*d.*, with leave to the defendants to move to enter a nonsuit or a verdict for them. A rule nisi was accordingly obtained, against which cause was shewn in Michaelmas Term last, when the rule was discharged: vide ante, p. 88. Whilst that rule was pending, the defendants obtained a rule nisi in the Mayor's Court for a new trial on the ground of surprise and of fresh evidence having come to the knowledge of the defendants since the former trial; and that rule was made absolute after the decision of this Court.

Field, Q.C. (*Waddy* with him), moved for a rule calling upon the defendants to shew cause why a writ of prohibition should not issue out of this Court, directed to the Mayor's Court of London, to prohibit that Court from trying the cause again. He submitted that, upon the true construction of s. 10 (1) of the

(1) By 20 & 21 Vict. c. clvii. s. 10, "If upon the trial of any issue the judge shall grant leave to the plaintiff or defendant to move in any of the superior Courts to set aside a verdict or a nonsuit, and to enter a verdict for the plaintiff or defendant, or to enter a nonsuit, as the case may be, or for a new trial, the party to whom such leave may have been given may apply by motion to such superior Court within such period of time after the trial as motions of the like kind shall from time to time be permitted to be made in such superior Court, for a rule to shew cause

why such verdict or nonsuit should not be set aside and a verdict entered for the plaintiff or defendant, or a nonsuit entered, or why a new trial should not be had, as the case may be, in such action; which Court is hereby authorized and empowered to grant or refuse such rule (which rule, when granted, shall operate as a stay of proceedings until the determination thereof), and afterwards to proceed to hear and determine the merits thereof, and to make such orders thereupon and as to the costs as the same Court shall think proper; and, in case such Court shall

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Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii), the cause having been once tried, and the points reserved having been disposed of by this Court upon the rule, it was not competent to the Mayor's Court to try it over again, and that the proceeding was a violation of the maxim, *Nemo debet bis vexari pro eadem causâ*. He further submitted that s. 22, which provides that "the judge of the court may at any time, within the jurisdiction of the Court, hear and grant applications for rules to shew cause in arrest of judgment, or for judgment non obstante veredicto, or for a repleader, or for granting new trials, and for entering nonsuits and verdicts in causes pending in the court," extends only to the time during which the cause is pending in the inferior court, and not to cases where the whole merits have been disposed of upon a rule granted in the superior Court.

BOVILL, C.J. The Mayor's Court Procedure Act, 1857, gives a limited jurisdiction to this Court and the other superior Courts to deal with such matters as are reserved for their opinion by the inferior court; and s. 10 directs that certain results shall follow from their decision thereon. But there is nothing in the Act to enable us to interfere with the ordinary jurisdiction of the Mayor's Court either before or after the decision of this Court upon the motion. I think there should be no rule.

KEATING, GROVE, and HONYMAN, JJ., concurred.

Rule refused.

Attorneys for plaintiffs: *Learoyd & Learoyd*.

order a new trial to be had in any such action, the party obtaining such order shall deliver the same or an office-copy thereof to the registrar of the said court, and thereupon all the proceedings on the former verdict or nonsuit shall cease, and the action shall proceed to trial according to the practice of the court in like manner as if no trial had been had therein; or, in case the Court before whom such rule shall be heard

shall order the same to be discharged, the party obtaining any such order may, upon delivering the same or an office-copy thereof to the registrar, be at liberty to proceed in any such action as if no such rule nisi had been obtained; and, if a verdict be ordered to be entered for the plaintiff or defendant, or a nonsuit be ordered to be entered, as the case may be, judgment shall be entered accordingly."

Applied. HESKELL v. CONTINENTAL
EXPRESS, LTD. [1950] 1 All E.R. 1033.

[IN THE EXCHEQUER CHAMBER.]

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Feb. 7:

HORNE AND ANOTHER v. MIDLAND RAILWAY COMPANY.

Measure of Damages for Breach of Contract—Common Carrier—Notice of Special Circumstances.

The plaintiffs, being shoe manufacturers at Kettering, were under a contract to supply a quantity of military shoes to a firm in London for the use of the French army at 4s. per pair, an unusually high price. The shoes were to be delivered by the 3rd of February, 1871, and the plaintiffs accordingly sent them to the defendants' station at Kettering for carriage to London in time to be delivered there in the usual course in the evening of that day, when they would have been accepted and paid for by the consignees. Notice was given to the station master (which for the purposes of the case was assumed to be notice to the company) at the time that the plaintiffs were under a contract to deliver the shoes by the 3rd, and that unless they were so delivered they would be thrown on their hands; but he was not informed that there was anything exceptional in the character of the contract. The shoes were not delivered in London till the 4th of February, and were consequently not accepted by the consignees, and the plaintiffs were obliged to sell them at 2s. 9d. a pair, which, in consequence of the cessation of the French war, was, apart from the previously-mentioned contract, the best price that could have been obtained for them, even if they had been delivered on the evening of the 3rd of February, instead of the morning of the 4th.

In an action against the defendants for the delay in delivering the shoes, they paid into Court a sufficient sum to cover any ordinary loss occasioned thereby, but the plaintiffs further claimed the sum of 267l. 3s. 9d., the difference between the price at which they had contracted to sell the shoes and the price which they ultimately fetched:—

Held (per Kelly, C.B., Blackburn, J., Mellor, J., Martin, B., and Cleasby, B. Lush, J., and Pigott, B. dissenting), that the plaintiffs were not entitled to recover the latter sum, the damage not being such as might reasonably be considered as arising naturally from the defendants' breach of contract, or such as might be reasonably supposed to have been in the contemplation of both parties at the time when they made the contract:

Per Kelly, C.B., Blackburn, J., and Mellor, J., and Cleasby, B., the notice given to the defendants was not such that they could reasonably be supposed to have had in their contemplation, at the time of entering into the contract for the carriage of the shoes, damages of such an exceptional nature as those claimed:

Per Martin, B., and, *semble*, per Blackburn, J., and Lush, J., a mere notice as such could not have the effect of rendering the defendants liable to more than ordinary damages; but it must in order to do so be given under such circumstances as to make it a term of the contract that the defendants will be liable for such damages if the contract be broken:

Per Lush, J., and Pigott, B., the notice given to the defendants was sufficient to put them upon inquiry as to the nature of the contract which the plaintiffs were under, and if they chose to accept the goods for carriage without further inquiry, they took the risk of what the contract might turn out to be, and were liable to the plaintiffs for the loss actually occasioned.

Hadley v. Baxendale (9 Ex. 341; 23 L. J. (Ex) 179), discussed.

ERROR from the judgment of the Court of Common Pleas upon a special case reported, Law Rep. 7 C. P. 583.

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Field, Q.C. (Lumley Smith with him), for the plaintiffs. Primâ facie the measure of damages is the amount of damage actually sustained. This rule is subject to the limitation that if the damages are exceptional, and such as the parties cannot be reasonably supposed to have contemplated when they entered into the contract, they cannot be recovered. In the present case the defendants must be taken to have contemplated the possibility of these damages occurring. Notice was given to their servant that the plaintiffs had a contract, and also that it was a profitable one, or else the shoes would not be likely to be thrown on their hands. This was sufficient to put the person receiving the goods on inquiry as to what the nature of the contract was; and no such inquiry having been made, the defendants must be looked upon as having taken the risk of what it might turn out to be, and cannot now say that they did not contemplate the damages. In *France v. Gaudet* (1), in a case of trover, it was held that the plaintiff could recover the amount of the price at which he had resold the champagne, which was converted.

[MELLOR, J. That case was peculiar. Champagne of a similar quality was said not to be procurable in the market. There was, therefore, no other test of the value of the goods.]

The value of the goods is the value that they have to the individual, and that is what he is entitled to recover: *Wilson v. The Lancashire and Yorkshire Ry. Co.* (2) The case falls within the principles laid down in *Riley v. Horne*. (3) If the carrier does not choose to inquire as to the value of the goods, he takes the chance of what they may turn out to be. So here the goods had a certain value to the plaintiff by reason of the contract he had; the defendants are told that there is such a contract, and they do not choose to inquire what it is.

[BLACKBURN, J. It is clear the plaintiff gave notice that it was important that the goods should be delivered on the 3rd, but he gave no notice of the extraordinary nature of the contract. There is a substantial consideration involved; if the carrier has notice of an extraordinary risk he may perhaps charge a higher rate of carriage to cover it. The real meaning of the limitation as to damages is that the defendant shall not be bound to pay more

(1) Law Rep. 6 Q. B. 199. (2) 9 C. B. (N.S.) 632; 30 L. J. (C.P.) 232.

(3) 5 Bing. 217, at p. 222.

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than he received a reasonable consideration for undertaking the risk of at the time of making the contract.]

Surely it cannot be necessary for a man to go with his contract in his hand, or to say, "I have contracted at such a price." It is sufficient if notice is given that the case is of an exceptional nature. Substantially, this notice amounted to an intimation that an important contract, of a highly beneficial character, was at stake.

[MARTIN, B. Must not there be what amounts to a contract to be responsible for the exceptional damages?]

In the case of *Hadley v. Baxendale* (1) it is stated that, "if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendants, and thus known to both parties, the damages resulting from such breach of contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated." It is not put as depending on a contract.

[BLACKBURN, J. In *Hadley v. Baxendale* (1) there was really no affirmative decision that a mere notice as such would be sufficient, because it was held that there was not a sufficient notice in that case. I know of no affirmative decision based on the dictum so thrown out in *Hadley v. Baxendale*. (1)]

The notice here given may be treated as evidence of a contract. [He also cited *Gee v. Lancashire and Yorkshire Ry. Co.* (2)]

H. James, Q.C. (*Sturge* with him). The inference to be drawn from the case is, that the market value of the goods on the day when they were brought to the defendants' station was the same as when they were ultimately sold. There is nothing to shew any diminution in value during that period. Admitting that the contract of the company was a contract to carry and deliver by the 3rd of February and was broken, the question is, what are the damages. The damages are those for which the defendants have contracted to be responsible; and *primâ facie* the contract is to be responsible for any diminution in the ordinary market value of the goods between the day on which they ought to have been delivered and the day on which they actually were

(1) 9 Ex. 341; 23 L. J. (Ex.) 179. (2) 6 H. & N. 211; 30 L. J. (Ex.) 11.

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delivered, and no such diminution is shewn here. If it be sought to impose a further liability on the defendants, it is necessary to prove knowledge of the special facts imparted to them under such circumstances, as that a term was engrafted into the contract that they should be liable for the special damage; see per Willes, J., in *British Columbia Saw Mill Co. v. Nettleship*. (1) Then, was any such term engrafted into the contract here? All the defendants were told was, that there was a contract; nothing was said as to the exceptional nature of that contract, and the unnaturally high price at which the shoes were sold arising out of the peculiar circumstances of the case. The value of the shoes must be considered for the purpose of estimating the damages as the value contemplated by both parties, not that which is known to the one only, and not communicated by him to the other. The burden of inquiry is not thrown on the carrier in such a case; it is for the party who seeks to fix him with the consequences of knowledge to communicate the circumstances to him. If mere notice is not sufficient as such, then there is no evidence here of a contract to be liable for the special damage. The mere receipt of the goods by the carrier after such a notice as was given here does not amount to such a contract. The company, as common carriers, are bound to carry the goods. Assume, for the purpose of argument, that the carrier would not be bound to carry if the consignor insisted on his undertaking an exceptional liability, or might be entitled to insist on an increased rate in consideration of his contracting to bear such liability; still, in order to raise an inference that the carrier has contracted to bear such liability the consignor must have acquainted him with the nature of it.

[LUSH, J. If your argument be correct the doctrine suggested in *Hadley v. Baxendale* (2) as to the effect of notice is wrong.

MARTIN, B. If a contracting party on receiving notice of the extraordinary liability sought to be cast on him refused to undertake it, clearly he would not be liable. Does not this shew that the right to exceptional damages depends on contract and not on mere notice?]

Assuming that notice might be sufficient, then the notice here was insufficient to bring the case within the doctrine in *Hadley*

(1) Law Rep. 3 C. P. 508.

(2) 9 Ex. 341; 23 L. J. (Ex.) 179.

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v. *Baxendale*. (1) [He also cited *Cory v. Thames Ironworks Co.* (2); *Smeed v. Ford* (3); *Great Western Ry. Co. v. Redmayne*. (4)]
Field, Q.C., in reply, cited *Peninsular, &c., Co. v. Shand* (5);
Great Northern Ry. Co. v. Behrens. (6)

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KELLY, C.B. I am of opinion that the judgment of the Court below must be affirmed. The rules by which this case must be determined are the creatures of authority, and we have not so much to consider in determining it what might be just or unjust, reasonable or unreasonable, under the circumstances of the case, in the absence of previous decisions, as to consider the cases that have been decided on the subject and deduce from them the general principles that must govern our judgment. It must, in the first place, be noticed that this is the case of a railway company, though it does not seem to have occurred to the court below, or to the counsel in arguing the case there, that there was any material difference between the case of a railway company and that of any ordinary person who had contracted for the delivery of goods. It therefore becomes incumbent upon us to consider what is the nature of the ordinary contract between the consignor of goods and the carrier, and what is the obligation imposed upon a railway company in respect of the carriage of goods of an ordinary character such as those in the present case.

It is necessary, however, in the first place, to deal with certain facts that were made the subject of discussion during the argument. Questions were raised with respect to the market price of the shoes at the time of the making the contract for the sale of them, at the time of their delivery to the company, and at the time when they ought to have been delivered to the consignees. I see, however, nothing whatever stated in this case to shew that the market price of the shoes at any time which it will be material for us to consider was more than the sum for which they ultimately sold, viz., 2s. 9d. a pair. We are not even told when the contract for the supply of the shoes was entered into, it is only stated in the case that the plaintiffs were in January and February,

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.

(2) Law Rep. 3 Q. B. 181.

(3) 1 E. & E. 602; 28 L. J. (Q.B.)

(4) Law Rep. 1 C. P. 329.

(5) 3 Moo. P. C. (N.S.) at p. 213.

(6) 7 H. & N. 950; 31 L. J. (Ex.)

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1871, under contract to deliver a quantity of shoes. Then, with regard to the other periods referred to, there are no materials whatever laid before us from which we can gather what the market price was other than the fact that on the day when they were disposed of they sold for 2s. 9d. a pair. It seems to me, therefore, that we must assume that the only market price put before us, viz., 2s. 9d. a pair, was the market price at the other periods in question. That being so, the plaintiffs deliver the shoes to the defendants to be conveyed by them to London, and there delivered on the 3rd of February, and they intimate to the defendants' servant that it is important that the shoes should be delivered on the 3rd, inasmuch as they are under contract to deliver them, and they will be thrown on their hands if not delivered. It is contended by the defendants that, under these circumstances, the plaintiffs can only recover damages calculated according to the ordinary value of the goods. A question of very great importance has been raised in the course of the argument, to which it is proper to refer, though, for reasons I shall presently state, I do not think it will ultimately become necessary to decide it—that is to say, the question what the position of a railway company is when goods are entrusted to it for carriage with an intimation of the consequences of non-delivery, such as it was argued on behalf of the plaintiffs existed in the present case. The goods with which we have to deal are not the subject of any express statutory enactment; the case with respect to them depends on the common law taken in connection with the Acts relating to the defendants' railway company. Now, it is clear, in the first place, that a railway company is bound, in general, to accept goods such as these, and to carry them as directed to the place of delivery, and there deliver them. But now suppose that an intimation is made to the railway company, such, as Mr. Field contended, this amounted to, not merely that if the goods are not delivered by a certain date they will be thrown on the consignor's hands, but in express terms stating that they have entered into such and such a contract and will lose so many pounds if they cannot fulfil it, what is then the position of the company? Are they the less bound to receive the goods? I apprehend not. If, then, they are bound to receive, and do so without more, what is the effect

of the notice? Can it be to impose upon them a liability to damages of any amount, however large, in respect of goods which they have no option but to receive? I cannot find any authority for the proposition that the notice without more could have any such effect. It does not appear to me that the railway company has any power, such as was suggested, to decline to receive the goods after such a notice, unless an extraordinary rate of carriage be paid. Of course they may enter into a contract, if they will, to pay any amount of damages for non-performance of their contract in consideration of an increased rate of carriage, if the consignors be willing to pay it; but in the absence of any such contract expressly entered into, there being no power on the part of the company to refuse to accept the goods, or to compel payment of an extraordinary rate of carriage by the consignor, it does not appear to me any contract to be liable to more than the ordinary amount of damages can be implied from mere receipt of the goods after such a notice as before mentioned.

For these reasons, even if the notice given in the present case could be taken as having the effect contended for by Mr. Field, I do not think, in the absence of any expressed or implied contract by the company to be liable to these damages, that there could be any such liability imposed upon them. But however this may be, and even assuming that there might be such a notice as would render the company liable to the exceptional damages claimed by the plaintiffs, I am clearly of opinion that the intimation given to the company in this case does not amount to such a notice. It certainly gave the defendants notice of what might probably be assumed to be the case without express notice, viz., that the plaintiffs being under contract to deliver the shoes, would have them thrown on their hands if not delivered in due time, but it gave the defendants no notice of the exceptional nature of the contract and the unusual loss that would result from a breach of it. That being so, the case comes within the principle clearly to be deduced from all the authorities (not excepting the case of *Hadley v. Baxendale* (1) itself, whatever view may be taken of the dictum in that case with respect to the effect of notice) viz., that the damages for a breach of contract must be such as may fairly and reasonably be con-

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sidered as arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. The effect of the notice here is, that the company must be taken to have contemplated that the plaintiffs were under a contract to deliver the shoes, and would be liable to lose the benefit of such contract, or to an action for breach of it, if they failed to deliver under it. The loss they would in the usual course of things sustain or the damages they would have to pay on such a contract would depend upon the rise or fall of the market price. We are not told when the contract for the sale of the shoes was made, nor what was the market price at that time. It appears to me, therefore, that the only damage we can consider is the difference between the market price at the time when the goods ought to have been delivered and the market price at the time when they were delivered. There is no evidence before us to shew that the market value of the shoes at the time when they were delivered to the defendants or at the time when they ought to have been delivered to the consignees, differed from their value at the time when they were ultimately sold. So far as appears from the case, it seems to me that it must be taken that the market price was the same at all those periods. Under those circumstances, in the absence of any notice to the defendants of the exceptional nature of the contract into which the plaintiffs had entered, I think the plaintiffs are only entitled to nominal damages, unless, perhaps, in respect of expenses, if any, that were incurred, which would be amply covered by the amount paid into court. It appears to me that very serious consequences might result from making a railway company liable upon a mere notice that the consignor is under contract to deliver, such as that in the present case, for an indefinite amount of damages arising out of a contract of a highly exceptional nature, entered into under very special circumstances.

MARTIN, B. After feeling considerable doubt in the course of the argument, I have at length arrived at the same conclusion as the Lord Chief Baron. The case is, no doubt, one of some hardship to the plaintiffs, for they have unquestionably lost a large sum in consequence of the non-performance by the defendants of

their contract. But upon the best consideration I have been able to give to the case, and looking to what is on the whole the best general rule to lay down in such cases, I am of opinion that the plaintiffs are not entitled to recover the extraordinary damages which they claim. It appears to me that one mode of testing the amount of the defendants' liability would be this: Suppose the goods, instead of merely being delayed in delivery, had been burnt while in defendants' custody. Would the plaintiffs have been entitled to recover for them at the rate of 4s. a pair, or only their value at the time when they were burnt? It strikes me that they could only recover their value when burnt, and not their value calculated according to the price at which they were sold some time before, when the market was higher. The case of *France v. Gaudet* (1), which was cited in argument, was between vendor and purchaser, and, it appears to me, involved, different considerations. I think these questions of damages must necessarily be considered very much upon the particular circumstances of each individual case. With regard to the present case another test may be suggested. If some other person had delivered a similar quantity of shoes to the defendants for carriage on the same day as the plaintiffs, not being under contract to deliver them, it is admitted he could only recover 20*l*. How can it be, in the absence of an express contract to that effect, that by reason of a mere communication to the defendants that the goods would be thrown on the plaintiffs' hands if not delivered in time, so widely different a liability can arise upon contracts for which the amount of the consideration was the same, and in all other respects precisely similar? There is also another consideration which arises with respect to the case of a carrier, such as this is, shewing the great importance of, as far as possible, keeping to a uniform rule with regard to damages in such cases. If such a notice as this were to be held sufficient to impose this exceptional liability on carriers, they would be laid open to imposition without end. There would be constant attempts to set up against them special circumstances, of which they would be alleged to have had notice, to enhance the damages. It seems to me that it would be very dangerous to impose any liability on a carrier to damages

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beyond the ordinary and natural consequences of his breach of duty, in the absence of something equivalent to a contract on his part to be liable to such damages.

BLACKBURN, J. I am also of opinion that the judgment should be affirmed. Various questions have arisen in the course of the case as to which it is not necessary to come to any absolute decision ; and I do not wish, sitting in a court of error, in any opinion I may express upon such questions to be taken to have given any absolute decision upon them. No doubt, *primâ facie*, the damages which actually result from a breach of contract are recoverable, provided that they are such as may fairly and reasonably be considered as arising directly and naturally, that is to say, in the ordinary course of things, from such breach of contract. The amount of them may be unexpectedly large, but still the defendants must pay. If a man contracts to carry a chattel and loses it, he must pay the value, though he may discover that it was more valuable than he had supposed. But when the damages sought to be recovered are not those which in the ordinary course of things would naturally arise, but are of an exceptional nature, arising from special and peculiar circumstances, it is clear that in the absence of any notice to the defendant of any such circumstances such damages cannot be recovered. It is said that there was a notice in the present case. Here arises, with relation to the doctrine of notice, one of those questions to which I have adverted, and on which in what I may now say I do not wish to be considered as expressing a final opinion. It is clear that if the notice be such, and given under such circumstances, as to amount to evidence of an actual contract to bear the exceptional loss arising from the breach of contract, then such contract, if found to exist, would be binding ; but here, as it seems to me, it is quite clear that there was no such special contract. The plaintiffs delivered the goods to the superintendent at the railway station to be carried by the railway in time to be delivered by the company on the 3rd of February, and gave him notice of the fact that if they did not arrive by that date loss would be occasioned to them. The company would be bound to deliver in a reasonable time, and this notice would amount to a notice to the company that the

reasonable time within which they would then be expected to deliver, under the circumstances of the case, was by the 3rd of February; but I cannot see how it would alter the ordinary contract of the company into a contract to deliver by the 3rd of February, or to pay 1s. 3d. damages per pair for the shoes. I doubt whether it would have been within the authority of the station master to make any such contract. Then if there was no special contract, what was the effect of the notice? In the case of *Hadley v. Baxendale* (1) it was intimated that, apart from all question of a special contract with regard to amount of damages, if there were a special notice of the circumstances the plaintiff might recover the exceptional damages. This doctrine has been adverted to in several subsequent decisions with more or less assent, but they appear to have all been cases in which it was held that the doctrine did not apply because there was no special notice. It does not appear that there has been any case in which it has been affirmatively held that in consequence of such a notice the plaintiff could recover exceptional damages. The counsel for the plaintiffs could not refer to any such case, and I know of none. If it were necessary to decide the point, I should be much disposed to agree with what my Brother Martin has suggested, viz., that in order that the notice may have any effect, it must be given under such circumstances, as that an actual contract arises on the part of the defendant to bear the exceptional loss. Before, however, deciding the point, I should have wished to take time to consider; but it is not necessary to do so, for even assuming that the law is the contrary of that which I incline to think it to be, to my mind it is clear that there was no such notice in the present case as to raise the question. There was, no doubt, a full intimation to the defendants that the time by which the goods were delivered was of consequence, that the reasonable time which the company had to deliver in must not be protracted beyond the 3rd of February, and I think it may fairly be said that there was an intimation to the defendants that the contract under which the plaintiffs had to deliver was a profitable one; but I cannot see, giving the notice its widest construction, that it amounted to a notice that the plaintiffs would suffer such an exceptional loss as

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 RAILWAY Co. they did by non-delivery of the shoes. So that I think it is not necessary to decide whether the dictum in *Hadley v. Baxendale* (1) is well founded, though I do not wish to disguise my present impressions on the subject.

MELLOR, J. I am of the same opinion. The contract entered into with the railway company by the plaintiffs was, as it appears to me, of the ordinary character, and there was a notice given that the goods were to be delivered by the 3rd of February, or they would be thrown on the consignors' hands. It does not seem to me that this notice, giving it its utmost effect, brings the case within the dictum in *Hadley v. Baxendale*. (1) It was a notice, no doubt, that it was important that the goods should be delivered by the 3rd of February, but it was no notice of the exceptional circumstances of the case, and the exceptional price which was to be given for the shoes. There was, it is true, a notice that the consignor was under contract to deliver the shoes, but nothing was told to the carrier as to the special nature of the contract. Under these circumstances it appears to me all that we can look to in estimating the damages is the market price when the shoes were delivered to the carrier, and the time when the contract was broken. What we are told as to that is, that in consequence of the cessation of the war between France and Prussia, Hickson & Sons, except for the circumstance that they had the contract in question with the French house, could not have sold the goods at any better price than that actually obtained if they had received them on the evening of the 3rd of February instead of the morning of the 4th. Under these circumstances, it seems to me, we must infer that the market value was the same on the 3rd as on the 4th, and so no special damages are recoverable. The sum of 20%, therefore, which was paid into court was amply sufficient.

PICOTT, B. I regret to be obliged to differ from the opinions expressed by my Lord Chief Baron and my Brothers Martin, Blackburn, and Mellor. I think the plaintiffs are entitled to recover the damages which they claim. The question which we have to decide is, upon what principle damages are to be assessed for

(1) 9 Ex. 341; 23 L. J. (Ex.) 179. 1873 350

breach of a contract to carry and deliver entered into by a railway company with a special notice to them of the consequences of breach of contract on their part. I agree that if the company are to be liable for extraordinary damages by reason of the notice given to them, it must be because they are at liberty to decline to carry the goods at an extraordinary risk, unless it be that they have a right to charge an extraordinary rate of carriage in consideration of incurring such risk. The company cannot, I should suppose, as carriers, go beyond the highest rate permitted by their Acts of Parliament in any case, and probably that rate would not be an adequate remuneration to cover the increased risk. The alternative is, that they may decline to carry goods which are not tendered to them for carriage upon the ordinary liability of common carriers, unless the consignors will enter into a special contract in relation to such goods. It follows, to my mind, that if they do not refuse the goods or make any special stipulations with regard to them, but accept the goods with notice of what the consequences will be if they are not delivered by a certain time without objection, there is evidence from which we may infer that they have contracted on the special terms that they will be liable for those consequences. The whole case, therefore, seems to me to resolve itself into the question, what was the contract between these parties? The notice given by the plaintiffs is to the effect that they are under contract to deliver the goods on the 3rd of February, and that if they do not deliver by that time the goods will be thrown on their hands. It seems to me this notice imports that the contract under which the plaintiffs were bound to deliver was a valuable contract to them, by performance of which they would reap profits, and by breach of which they would sustain loss. The defendants receive the goods under this notice, and they do break their contract, and the plaintiffs, as a consequence of such breach, incur loss to the extent of 1s. 3d. per pair upon the shoes. Such loss being actually the result of the defendants' breach of contract, why are the plaintiffs not to recover it? It can only be by reason of some artificial rule established by the decisions, or some ground of public policy, that makes the measure of the damages which may be recovered less than that which is actually sustained. I agree that the true rule is that which has been laid down, viz., that the damages must be

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such as naturally, i.e. in the ordinary course of things, flow from the breach, or such as may reasonably be supposed to have been in the contemplation of the parties. Why are not the damages in this case of the latter character? It does not seem to me to be shewn that there was anything exceptional in the nature of the contract entered into for sale of the shoes. There was nothing exceptional in the price that I can see. The price was not greater than would have been given at the time the contract was made to any other person than the plaintiffs. It was the ordinary price which would have been paid at that time by reason of the circumstance that shoes were then in great demand in consequence of the French war. When the time came for delivery the price had fallen to 2s. 9d., because the war was about to cease and the demand was smaller. What is there more in this than that the market had fluctuated and fallen between the time when the contract was made and the time for delivery? It is said that the defendants would not contemplate so large a loss from the notice that they received. If this notice be not sufficient it must be necessary in such a case to communicate the exact details of the contract. I cannot think this is so. If the carrier is told that the consignor is under contract to deliver by a certain day, or else he will lose the benefit of the contract, and accepts the goods without further inquiry, does he not take the risk of what the loss on the contract may turn out to be? The consignor has put him on his guard, and if he omits to inquire further, he has only himself to blame. I agree with my Brother Martin, that these cases as to damages must necessarily often stand very much on their individual circumstances, but it seems to me that the present case is within the doctrine laid down in *Hadley v. Baxendale* (1) and the cases that have followed it, and that these damages are such as may reasonably be considered as having been within the contemplation of the parties at the time they made the contract as the probable result of a breach of it. I therefore think the judgment of the Court below should be reversed.

LUSH, J. I also think the judgment of the Court below should be reversed. I agree that the liability of the carrier under ordi-

(1) 9 Ex. 341; 23 L. J. (Ex.) 179. *1873 358*

nary circumstances is to pay such damages as are the natural and ordinary consequences of the breach of his contract, or such as may be reasonably supposed to have been in the contemplation of the parties. I think that the duty of the carrier is co-extensive with such liability. He is not at liberty to refuse to carry on the ordinary terms, but if it is sought to impose upon him a liability of an extraordinary nature arising out of peculiar circumstances, then I think he is entitled to decline to carry, unless he be paid a higher rate of carriage. Though there is no decision to that effect, the conclusion seems to me plainly deducible from the judgment in *Riley v. Horne* (1), which was a considered judgment of the Court of Common Pleas delivered by Best, C.J. The law is thus laid down at p. 220 of the report: "As the law makes the carrier an insurer, and as the goods he carries may be injured or destroyed by many accidents against which no care on the part of the carrier can protect them, he is as much entitled to be paid a premium for his insurance of their delivery at the place of destination as for the labour and expense of carrying them there. Indeed, besides the risk that he runs, his attention becomes more anxious and his journey is more expensive in proportion to the value of of his load. If he has things of great value contained in such small packages as to be objects of theft or embezzlement, a stronger and more vigilant guard is required than when he carries articles not easily removed and which offer less temptation to dishonesty."

It appears to me plainly to follow from this exposition of the law that if it is sought to fix a carrier with any extraordinary liability he may decline to carry unless a higher rate of remuneration be paid to him. It seems to have been accepted as the law from the case of *Hadley v. Baxendale* (2) downwards, that where notice is given to the carrier of the special circumstances, and he consents nevertheless to carry the goods without objection, he may be liable for the extraordinary damages arising out of such circumstances. I agree, however, with the suggestion that the notice in such cases can have no effect except so far as it leads to the inference that a term has been imported into the contract making the defendant liable for the extraordinary damages. As Willes, J., says in *British Columbia Saw Mill Co. v. Nettleship* (3), "the

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(1) 5 Bing. 217.

(2) 9 Ex. 341; 23 L. J. (Ex.) 179.

(3) Law Rep. 3 C. P. 499, at p. 509.

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knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." I think if the person delivering the shoes had said to the station-master that he was under contract to deliver the shoes by the 3rd of February, and would gain so much if he performed his contract and lose so much if he did not, and the station-master had without objection consented to receive the shoes, the company would have been liable. No question is now raised as to the authority of the station-master, and it must therefore be taken that for this purpose he represents the company. I have no doubt that what did pass on the delivery of the goods was equivalent to a distinct acceptance of the shoes by the company to be carried on the terms that the company were to be liable for the consequent loss to the plaintiffs if the shoes were not delivered.

To my mind the statement made to the station-master must have conveyed to his mind the impression that the plaintiffs were under a profitable contract to deliver the shoes by the 3rd of February and would lose the benefit of such contract if the shoes were not so delivered. It was not specified how much the plaintiffs would lose, but I do not think that was necessary. The rule seems to apply which was laid down by Best, C.J., in *Riley v. Horne* (1), to the effect that if the carrier choose to make no inquiry as to the nature of the goods he is responsible to the full value in case of loss, and cannot afterwards complain that he was not informed of such value. It seems to me by analogy that the intimation here given to the station-master was sufficient to throw upon him the duty of inquiring what the consequences would be if the shoes were not delivered, and if he did not do so, but received the goods without objection, the company is in the same position as if the whole details of the contract were communicated to them.

CLEASBY, B. I agree with the conclusion arrived at by the Lord Chief Baron and those members of the Court who concurred with him. I offer no opinion on the question how far a notice might be sufficient to fix the defendants with exceptional damages considered merely as a notice, and not as amounting to evidence of

a contract to be liable for such damages, though I do not wish to be understood as differing from the opinion expressed by Willes, J., in the *British Columbia Saw Mills Co. v. Nettleship* (1) on that point; nor do I express any opinion on the question how far a railway company may be placed in a different position from any other persons in such a case as the present. The safest course in this case appears to me to be to affirm the decision of the Court below on the ground on which it was given, if that ground was sufficient. I rest my judgment on the ground that, even if a mere notice could be sufficient, the notice here is not of such a nature as to affect the defendants with knowledge of the exceptional terms of the plaintiffs' contract for the supply of the shoes. The case states that the plaintiffs were under contract for sale of the shoes, but it does not say when such contract was made; but as it is stated to have been subsisting in January, it was probably made some time before. It appears that if the shoes were not delivered by the 3rd of February the purchasers were entitled to refuse to accept them, so that the last day for delivering under the contract must have been the 3rd of February; but it does not appear that they might not have been delivered before. So that it comes to this: that the plaintiffs are really seeking to make the defendants responsible for loss which was in great measure caused by their driving off delivery to the last day on which it could be made under the contract. I must say I think the materials on which they seek to do so are wholly insufficient. No intimation was given to the defendants as to the peculiar nature of the contract or the exceptional price at which the shoes were sold, so as to give them any opportunity of contracting with reference to the precise liability which they were to incur. The only way in which the case can be put on behalf of the plaintiffs is the way in which it was put by my Brother Lush, namely, that enough was said to put the defendants on inquiry as to the details of the contract, and that by not inquiring they dispensed with any further notice as to its terms. I cannot agree in that view of the case. I should hesitate to regard the station-master as a person entrusted with a discretion as to making such inquiries, though I do not base my judgment on that ground. I do not think enough was told to the station-master

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(1) Law Rep. 3 C. P. at p. 509.

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to put him on inquiry. There was nothing to indicate to him the probability of the contract being of so exceptional a character, and the consequences of breaking it so unusually large.

Judgment affirmed.

Attorneys for plaintiffs: *Sawbridge & Wrentmore.*

Attorneys for defendants: *Beale, Marigold, & Beale.*

Feb. 10.

[IN THE EXCHEQUER CHAMBER.]

BAYLEY v. THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE
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*Master and Servant—Railway Company, Responsibility of, for Act of Servant—
 Scope of Employment.*

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200576-7
 The plaintiff, a passenger on the defendants' line of railway, sustained injuries in consequence of being violently pulled out of a railway carriage, just after the train had started, by one of the defendants' porters, who acted under an erroneous impression that the plaintiff was not in the right train for the place to which he had booked. The defendants' rules, a copy of which was given to each porter in their employ, assigned various specific duties to the porters, among others, that of not suffering passengers to get in or out of trains in motion, and concluded with a general direction that they were to do all in their power to promote the comfort of the passengers and the interests of the company. It was proved to be the duty of the porters to prevent passengers going by wrong trains, as far as they could do so, but it was not their duty to remove passengers from the wrong train or carriage:—

Held, affirming the decision of the Court below, that there was evidence on which the jury might find that the act of the porter in pulling the plaintiff out of the carriage was an act done within the course of his employment as the defendants' servant, and one for which they were therefore responsible.

THIS was an appeal by the defendants against the judgment of the Common Pleas discharging a rule to enter a nonsuit.

The report of the case in the Court below is to be found in Law Rep. 7 C. P. 415, where the pleadings are given. The facts, as stated in the case on appeal, were in substance as follows:— (1)

1. This cause came on for trial at the Cheshire Spring Assizes,

(1) It has been thought expedient to set out the facts as found in the case on appeal, inasmuch as the case took a slightly different course from that which it took in the Court below,

involving the necessity for a somewhat fuller account of the facts than was necessary in the report of the case below.

1872, before Baron Channell. The action was brought by the plaintiff to recover compensation from the defendants for bodily injuries sustained by him under the following circumstances:—

2. The plaintiff, on the 26th of July, 1871, took a ticket by the defendants' railway from a station called Guide Bridge, on the defendants' line, to Stockport, by a train which left Guide Bridge between half-past six and seven o'clock on the evening of that day, intending to get thence to Macclesfield.

3. The plaintiff, after taking a third-class ticket by the defendants' line as before mentioned, proceeded to enter and take his seat in a third-class carriage forming part of the train. Upon his doing so one of the porters in the employ of the defendants asked him where he was going to, to which he replied, "To Woodley, and thence to Stockport and Macclesfield." The porter rejoined, "You are in the wrong train, you must come out," and immediately, and just as the train was moving off, violently pulled the plaintiff out and threw him down on the platform. The plaintiff, by the fall under the circumstances above-mentioned, sustained the bodily injuries in respect of which this action was brought. The plaintiff was in fact in the proper train, and in that by which he intended to travel.

It was proved that it was part of the duties of the porters to prevent passengers going by wrong trains, as far as they were able to do so.

4. The rules and bye-laws of the company were put in evidence on behalf of the defendants, and it was further proved that the porters and servants of the company, including the porter whose conduct caused the injury to the plaintiff, were supplied with copies thereof.

5. Among the rules and bye-laws were the following:—

RULE 71.—Clerks in charge, station masters, guards, police, and porters are on no account to suffer passengers to get into or out of the carriages while the trains are in motion, in contravention of the bye-laws; and the names and addresses of any persons persisting in so offending are to be immediately reported to the superintendent of the line.

RULE 92.—Porters are to act under the orders of the clerks in charge, station masters, station inspectors, and foremen. They are to do the work and attend to whatever business they may have assigned to them, exerting themselves for the good order, regularity, and cleanliness of the trains and stations where they are placed, and do all in their power to promote the comfort of the passengers and the interests of the company.

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RULE 101.—If the clerk in charge or guard has reason to suppose that any passenger is without a ticket, or is not in the proper carriage, he must request the person to shew him his ticket, have any irregularity corrected, and the excess fare paid if any is due; and should any passenger wish to change his place from an inferior to a superior carriage, the guard must see the excess fare paid at the station where the change is made.

RULE 105.—The doors of the carriages on the off side are always to be locked, and guards must see that passengers keep their seats in case of any stoppage on the road, except when necessary to alight, and exert themselves to prevent passengers getting in or out of the train while in motion.

RULE 107.—Smoking in the carriages and at the stations must not be allowed; and in the event of any passenger being disorderly or misconducting himself, the guard must endeavour to stop the nuisance, but in case he cannot succeed by gentle means, he must take such a course as may be considered necessary, and either place the offender in a compartment alone or leave him at the next station, according to circumstances, in all cases obtaining and reporting his name and address, if possible, to the superintendent of the line.

BYE-LAW 4.—Smoking is strictly prohibited, both in the carriages and in the company's stations or premises. Every person smoking in a carriage, or in any station, or upon any of the company's premises, is hereby subjected to a penalty not exceeding 40s.; and any person persisting in smoking in a carriage or station, or upon the company's premises, after being warned to desist, shall, in addition to incurring a penalty not exceeding 40s., be immediately, or, if travelling, at the first opportunity, removed from the company's premises.

BYE-LAW 5.—Any person found in the company's carriages or stations, or on the company's premises, in a state of intoxication, or committing a nuisance, or otherwise wilfully interfering with the comfort of other passengers, is hereby subjected for every such offence to a penalty not exceeding 40s., and shall immediately, or, if travelling, at the first opportunity, be removed from the company's premises.

BYE-LAW 8.—Any person who shall enter or leave, or shall attempt to enter or leave, any of the carriages while the train is in motion, or at any other place than the regular passenger platform or other place appointed by the company for passengers to enter or leave the carriages, shall for every such offence forfeit or pay any sum not exceeding 40s.

6. It is the duty of the porters of the company, if passengers are in a wrong train or carriage, to inform them of the fact, and request them to alight before the train starts, and in default of their so doing to report them to the guard, with the view of their being charged any excess fare which may be due under the circumstances, but not to remove them from the train or carriage.

7. It was objected on behalf of the defendants that the porter had no authority from the company, express or implied, to drag the plaintiff out of the carriage under the circumstances above stated. That it was, in fact, in contravention of the rules, and not

within the scope of his employment, but a wilful and illegal act of his own, done on his own responsibility, for which the company were not liable. The learned judge gave the defendants leave to move to enter a nonsuit or a verdict on these grounds. The jury found a verdict for the plaintiffs with 200*l.* damages.

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Hughes (*Field*, Q.C., with him), for the defendants, the appellants. The general principle that governs these cases appears to be that where the servant is acting within the scope of his employment, and has a discretion entrusted to him, then, however improperly he may exercise such discretion, the master is responsible. Here no discretion was intrusted to the servant. It is found that it was not the duty of the porters to remove persons who might be in the wrong carriage. There was also a bye-law distinctly forbidding persons from getting out of the carriages when in motion, and the porters are expressly ordered to exert themselves in preventing breaches of such bye-law. How then can it be said that the porter was acting within the scope of his employment in violently dragging the plaintiff out of the carriage when the train was already in motion?

[KELLY, C.B. There is a direction expressly given to him to prevent persons if possible from travelling in the wrong carriage. Was he not acting in what he might think to be the performance of that duty in removing the plaintiff?]

It is expressly stated in the case that it was not the duty of the porters to remove a passenger from the wrong carriage.

[BLACKBURN, J. The question is, whether there was any evidence for the jury of an authority to the porters to remove a person from the wrong carriage. In one sense, no doubt, it might not be their duty. If I tell my coachman he must not get drunk and flog the horses immoderately, no doubt it is not his duty to get drunk and flog the horses immoderately, but if he does so in the course of his employment, shall I not be responsible?]

It must be admitted that no directions as to the mode of executing the authority can exonerate the master; but it is contended that here there is no question as to the mode of executing the authority. It cannot be said to be within the scope of the authority to do acts which are expressly forbidden by the company's in-

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structions. If the porter had been entitled to remove a passenger from the carriage under the circumstances which he conceived to exist, then for any blundering or undue violence in so doing on his part the defendants would clearly be responsible. But under no circumstances was it his duty to remove the passenger, even when the train was stationary, much less when the train had started.

[PIGOTT, B. Is not the question here, whether he was acting within the scope of his employment? He might be doing an act which was, in one sense, not his duty, and yet, as it appears to me, be acting within the scope of his employment. A general duty was cast upon him to prevent passengers from riding in the wrong carriages. What he erred in was the mode in which he performed such duty.]

McKenzie v. McLeod (1) is a similar case to the present, and the defendant was held not to be liable.

[BLACKBURN, J. In that case the servant burnt the house down in trying to cleanse the chimney; but it was distinctly shewn that it was not her duty in any case to cleanse the chimney, but only to light the fire, and, therefore, that she was not acting in the course of her employment. The present case would be analogous if there were no authority to prevent persons from travelling in wrong carriages.]

He also cited *Roe v. Birkenhead Ry. Co.* (2); *Poulton v. South Western Ry. Co.* (3); *Edwards v. North Western Ry. Co.* (4); *Limpus v. London General Omnibus Co.* (5); *Seymour v. Greenwood* (6); *Moore v. Metropolitan Ry. Co.* (7); *Eastern Counties Ry. Co. v. Browne.* (8)

McIntyre, Q.C. (*Ignatius Williams* with him), for the plaintiff, was not called upon.

KELLY, C.B. The principle to be deduced from the authorities on this subject is, that where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable even though the acts done may

(1) 10 Bing. 385.

(2) 7 Ex. 36.

(3) Law Rep. 2 Q. B. 534.

(4) Law Rep. 5 C. P. 445.

(5) 1 H. & C. 526; 32 L. J. (Ex.) 34.

(6) 6 H. & N. 359; 7 H. & N. 355

30 L. J. (Ex.) 189, 327.

(7) Law Rep. 8 Q. B. 36.

(8) 6 Ex. 314; L. J. (Ex.) 196.

be the very reverse of that which the servant was actually directed to do. Here it is unquestionably found that it was the duty of the porters to prevent persons from travelling in the wrong carriages as far as they were able to do so. The porter in this case sees the plaintiff in what he conceives to be the wrong carriage. Does he not act in what he may well suppose to be the performance of his duty when, having no other means of preventing the plaintiff from travelling in such carriage, he pulls him out? In the present case no doubt the porter acted blunderingly, and the results were unfortunate to the company, but one can well imagine a case in which the porter might rightly conceive it to be for the interests of the company and his imperative duty at any risk to remove a person from a carriage, even if force were necessary. A carriage might be so dangerously overcrowded as to expose the company to the risk of incurring serious responsibility as the consequence of such overcrowding. Various other grounds may be suggested on which it might be the porter's duty to remove a person from a carriage. The present case is distinguishable from the cases of isolated acts unconnected with other circumstances done by a servant in direct disobedience to the orders of a master. Here among many precepts and directions to the porters we find it distinctly provided that they are, as far as they are able, to prevent persons from travelling in the wrong carriage. We do find it no doubt also stated that it was not the duty of the porters to remove a person from the wrong carriage; but where orders are given to some extent inconsistent, and such that it may not always be easy under all circumstances to comply literally with the provisions of all of them—for instance, where, as in the present case, there is a general order to prevent persons from travelling in the wrong carriage if possible, accompanied by a direction not to remove them from the carriage—it is obviously very likely that the servant may, while acting in the performance of the general duty cast upon him, neglect the particular direction as to the mode of doing it. But it appears to me that he will be none the less acting within the scope of his employment. Again, the rules expressly provide that the porters shall do all in their power to promote the interests of the company, and if a porter, intending to act in the performance of the duty so cast upon him and doing something with a

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view to the interests of the company, happens to disobey another direction really to some extent inconsistent with the general orders given to him, it is very difficult to say that in so doing he is not acting within the scope of his employment. On the whole, I think the porter here was so acting; he was interfering in a case in which it was obviously his duty to interfere, and to act to the best of his ability for the protection of the interests of the company; under these circumstances, if in so doing he acted wrongfully or negligently, I think the company must be liable. For these reasons it appears to me that the judgment of the Court below should be affirmed.

MARTIN, B. I am of the same opinion. I am disposed to think that we must be governed in deciding this case by the general principles of the law of master and servant, and that it is really quite immaterial what the rules and bye-laws of the company were. The question appears to me to be principally one of fact, and if in fact the porter thought that this man was in the wrong carriage, and, acting as the servant of the company, pulled him out of a carriage of the company where he thought he had no right to be, the company are responsible for his wrongful act in so doing.

BLACKBURN, J. I also think that the judgment of the Court below should be affirmed. The law is clear that where a servant, acting within the scope of his employment, does an act negligently, or with excessive violence, the master is responsible for the consequences. In the case of *Seymour v. Greenwood* (1) there was very great excess of violence used by the servant, and yet the master was held responsible because the servant was acting within the scope of the employment, however outrageous and improper the manner in which he did it might be. The question here, therefore, is whether there was evidence that the porter, in what he did, was acting within the scope of his employment. If he were so acting, then, however much he may have abused his authority, however improperly and blunderingly he may have acted, the defendants are liable. It seems to me that the judgment of the Court below puts the case upon its fair footing. It is

(1) 6 H. & N. 359; 7 H. & N. 355; 30 L. J. (Ex.) 189, 327.

stated, in the third paragraph of the case, that it was the duty of the porters, as far as possible, to prevent persons from going in the wrong carriages. Even without the statement it would be tolerably obvious that such is their duty. It is, likewise, expressly provided by the rules that the porters are to promote the comfort of passengers and the interests of the company. In this particular case the porter, in a stupid, blundering manner, did what, certainly, in the result, did not promote the comfort of the passengers nor the interests of the company; but he was given authority, as far as he could, to prevent passengers from travelling in the wrong carriage, and general directions to promote the interests of the company to the utmost of his power, and if, thinking that the plaintiff was really in the wrong carriage, and that he could get him out without hurting him before the train had got into motion, he acted as he did, it seems to me impossible to say that in so acting he was acting beyond the scope of his authority. The result is as summed up in the judgment below. "There was evidence of authority to remove a person in a wrong carriage abused by a blundering servant of the company in pulling the plaintiff out of the right one in the supposed 'interest of the company.'" If this be so, it is clear that the defendants are liable. There is a reasonable foundation of such liability. If the company employs porters at a station, who may necessarily, in the performance of their duties, have to exercise a discretion as to the application of personal force to passengers, they must take care that such porters are steady, trustworthy, and intelligent persons, by whom such a discretion may be properly exercised.

MELLOR, J., concurred.

PIGOTT, B. I agree, on the whole, that the judgment of the Court below must be affirmed, though, I own, I think the case one that is very near the line.

LUSH, J. I also think the judgment should be affirmed. I base my judgment on the statement in the third paragraph that the porters' duty was to prevent persons from travelling in the wrong carriages. The porter here was endeavouring to prevent the plaintiff from travelling in the wrong carriage. It is true that

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the plaintiff was not in truth in the wrong carriage, but the porter thought that he was; and so clearly, in pulling him out, he was acting within the scope of his employment, and the company are responsible.

CLEASBY, B. It does not appear to me that the rules given to the porters are of very much importance in determining the case, for it seems clear that there are many cases beyond the rules in which the porters must act on their discretion as to what it may be best to do under the circumstances. It is stated in the judgment of the Court below that there was evidence of authority: if so, of course the defendants may be made liable; but it seems to me that the case on appeal states rather indistinctly what the authority was. At the end of the third paragraph it is stated that the porters' duty was to prevent persons from travelling in the wrong carriages. In paragraph 6 there is another statement as to the duty of the porters, which, I suppose, must be read as applying to a different class of circumstances. As the rest of the Court are clear upon the statement in paragraph 3 that there was authority to remove a person from the wrong carriage, I am not prepared to differ from them. Then, if there were such authority, the case is clearly one of a servant doing, in an improper manner, what was within the scope of his employment, and the defendants must be responsible.

Judgment affirmed.

Attorneys for plaintiff: *Lewis & Sons, for Higginbotham & Barclay.*

Attorneys for defendants: *Cunliffe & Beaumont.*

[IN THE EXCHEQUER CHAMBER.]

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THE BRECON MARKETS COMPANY *v.* THE NEATH AND BRECON RAILWAY COMPANY.*Toll Traverse—Brecon Markets Act, 1862 (25 & 26 Vic. c. clxxxvi.)—Toll for Goods Carried by Railway.*

The Brecon Markets Act, 1862, vested in the plaintiffs certain tolls, which, under the name of "drift tolls," had been immemorially received by the corporation of Brecon for cattle, goods, and carriages passing to, through or from, the borough. A railway company, under the sanction of an Act passed in the same session, acquired land, not being a highway, on which they constructed a railway and station within the borough of Brecon, whence passengers, goods, and cattle were conveyed by other lines of railway to other places beyond the limits of the borough. The rights of the corporation and of the plaintiffs were expressly reserved by the Railway Act, but there was no provision either in that or in the Markets Act expressly enabling the plaintiffs to levy tolls on the railway.

Held, affirming the decision of the Court below, that the plaintiffs were not entitled to toll in respect of cattle, goods, or carriages passing along the railway.

ERROR from the judgment of the Court of Common Pleas upon a special case reported, Law Rep. 7 C. P. 555, where the facts are fully stated.

Dowdeswell, Q.C. (with him *Morgan Howard*, and *Hughes*), for the plaintiffs. The argument for the defendants will be that the right to tolls applies only to carriages passing over the public ways of the borough, and not to those passing over land which is the private property of the railway company. But the right to take tolls extends to the passage of vehicles over any part of the borough. There is a distinction between toll thorough and toll traverse, which the judgment of the Court below does not seem to have sufficiently kept in view. In the case of toll thorough there must be a present subsisting consideration for the toll of which the individual to be charged may avail himself. There need be no such consideration for a toll traverse. The judgment below seems to be based in substance on the ground that because the land over which the toll was claimed was the defendants' own land there could be no consideration for the toll. A toll traverse may exist though the land over which it is claimed no longer belongs to the toll owner.

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[KELLY, C.B. Can you cite any case where it has been held that a toll traverse can be claimed over land no longer the property of the claimant of the toll in the absence of any reservation by him of the prescriptive right?]

The right to the toll is a franchise distinct from the ownership of the soil, and not a mere territorial right. It is a general rule, applicable to all prescriptive rights, that if there could have been a legal origin for a right that has been actually enjoyed, the existence of such origin must be presumed. Therefore, if such a right as that now claimed might have been reserved, such a reservation must be presumed to have been made when the land was aliened. A right may legally exist to take toll traverse in respect of anything brought into or out of the borough just as there may be a right to a harbour toll on goods landed in any part of a manor: *Crispe v. Belwood*. (1)

[KELLY, C.B. If there were any evidence of a reservation of the right to toll on the alienation of these lands by the corporation the case might be different.]

If it be admitted that there might be such a right as is claimed the question resolves itself into a mere matter of evidence, and for the reasons before given, that such a reservation must be presumed. The right to toll, as described in the Acts of Parliament, applies generally to the whole borough, and is not limited to any particular road or street already opened. The presumption, therefore, must be that there was a reservation of such a right on alienation of any lands belonging to the corporation.

[MELLOR, J. It seems to me the more reasonable presumption on the facts would be that the right of toll was in respect of certain definite roads in the borough.]

BLACKBURN, J. A toll traverse arises in most cases by prescription in respect of particular roads over an estate. Can the right to a toll traverse be impressed on the whole estate so that the toll may be claimed for passing over any part of it, though it has never in fact been paid before in respect of passage over the part in question, and such part has ceased to be the property of the toll owner and become the private property of some one else?]

(1) 3 Lev. 424.

The case of *Rickards v Bennett* (1) seems to shew by analogy that there might be such a right. There a claim by prescription by a lord of a manor to toll upon all goods brought within any part of the manor for sale was held good. It is not impossible that the present toll may have had a similar origin. The crown may have granted to the lords of the town of Brecon, which was, very anciently, an important fortified place, in all probability chiefly occupied by the lord's retainers, the franchise of taking toll for all goods passing into, through, or out of the town.

[BLACKBURN, J. The case of *Rickards v. Bennett* (1) is the case of a market toll, which is not really analogous to the present case.]

He also cited *James v. Johnson* (2); *Lord Pelham v. Pickersgill* (3); *Lord Falmouth v. George* (4); *Foreman v. Free Fishers of Whitstable* (5); *Jenkins v. Harvey*. (6)

Manisty, Q.C. (*J. O. Griffiths* with him), for the defendants, was not called upon.

KELLY, C.B. In this case the plaintiffs, the Brecon Markets Company, claim a toll traverse in respect of all waggons passing to, through, or from the borough. I will assume, for the purposes of the case, that they have a right to such a toll, which it is not unlikely may be founded on a grant made to the borough of Brecon at or about the time of its incorporation, which appears to have been very ancient. The probable consideration for such a grant might be that the corporation had made or were about to make roads passing through lands at that time belonging to the borough. Such a grant would, no doubt, have been legal, and would have entitled the borough to a toll traverse in respect of vehicles passing along such roads. It may also be, though I am not prepared to hold one way or the other on the question, that if subsequently to such a grant other highways were made entering into, traversing, and passing out of the borough, even if they were made not by the corporation, but by other persons, on land which, though formerly the property of the borough, was no longer so, there might be a legal right to a toll traverse in respect of such highways.

(1) 1 B. & C. 223.

(2) 2 Mod. 143.

(3) 1 T. R. 660.

(4) 5 Bing. 286.

(5) Law Rep. 4 H. L. 266.

(6) 2 C. M. & R. 393.

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It might be, if there had been property within the borough belonging to the Corporation of Brecon, but which the corporation, at some remote period, had aliened in fee, reserving to themselves the right, if highways were made on such land, of taking a toll traverse in respect of the passage of vehicles over such highways, that such a toll traverse might lawfully exist and be enforceable. I do not say it is so, but assuming all this, and assuming that the lands now in question through which the railway passes, did originally belong to the corporation, it must be taken so far as appears from the circumstances set forth in this case, that they were at some former period of time aliened without any such reservation or exception as I have adverted to whatever, and being thus aliened, the question arises whether there is any shadow of authority whatsoever for the proposition that if the grantor or owner of the land so aliened without reservation makes a way over that, his own private property, for his own purposes, the corporation can lay claim to a toll traverse in respect of his use of such way. It appears to me that the contention of the plaintiffs in the present case amounts to such a proposition. I am of opinion that no right exists or is recognized by the law by which a toll traverse can be claimed in respect of the passage of vehicles over land which is private property, which was aliened by its original owners long ago, without any reservation or exception whatsoever, and for which the present possessors have probably paid a full consideration. It is not contended that what the company have done in any way amounts to a mere evasion of an established right of the plaintiffs, in which case somewhat different considerations might arise. They have merely constructed a railway in conformity with their Acts of Parliament. Under these circumstances, I think the decision of the Court of Common Pleas was right and should be affirmed.

MARTIN, B. I am of the same opinion. The tolls the corporation are entitled to are called drift tolls, and they are described in the 4th schedule to the Markets Act as being, in respect of every score of horned cattle driven through the borough, and of every score of sheep or swine, and in respect of every waggon or carriage with four wheels belonging to any person not residing in the county of Brecon, passing to, through, or from the

borough, and so forth. I do not believe, because railway trucks are called waggons, they are necessarily to be brought within this schedule. It seems to me that the passage of goods on the railway is quite a novel species of carriage, and not contemplated at all by the schedule of tolls, and quite beyond the scope of it.

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BLACKBURN, J. I am also of opinion that this judgment should be affirmed. It is quite true, I think, as contended by Mr. Dowdeswell, that in the case of a toll or any other prescriptive right which has in fact existed for a long time, if any reasonable mode can be suggested by which it may have had a legal origin, it must be presumed that it had such origin. It is also, I think, quite true that in the case of a harbour toll the right to the toll may extend throughout a manor, or in the case of a market toll, the right may extend throughout a town; but I do not think that there is any case which shews that where there is the right to a toll traverse within any district there can be a legal origin for a claim to take such toll in respect of a way used by a person over his own private land. It does not, however, seem to me necessary to decide how this may be, for I do not see in the present case anything to shew that the Corporation of Brecon ever were accustomed to receive any such a toll as is now claimed. It appears they were accustomed to take certain tolls which are described as drift tolls; but it does not appear to me that that is any evidence to shew that they ever enjoyed such a right as Mr. Dowdeswell now seeks to establish on behalf of the plaintiffs.

MELLOR and LUSH, JJ., and PIGOTT and CLEASBY, BB., concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Williams, Blyth, & Marsland, for R. C. Cobb, Brecon.*

Attorneys for defendants: *Dean & Taylor.*

1872

Nov. 16 ;

1873

Feb. 24.

HARVEY v. WALTERS.

Easement—Right of Eavesdropping—Alteration of Mode of Enjoyment—Trespass.

10 Ch 585
The plaintiff was the owner of certain premises, the eaves of which projected over adjoining land of the defendants, and had become entitled by length of user to have the rain-water drop from such eaves on to the defendant's land. The plaintiff in rebuilding his premises carried the wall abutting on defendant's land to a slightly greater height than before, and consequently raised the height of the eaves from the ground to the same extent:—

Held, that in the absence of any evidence that a greater burthen was thrown on the servient tenement by the alteration, the easement was not thereby destroyed, and the plaintiff was entitled to the right of eavesdrop from the premises as altered.

Thomas v. Thomas (2 C. M. & R. 34) followed.

THE third count of the declaration alleged that the plaintiff was entitled to a right of having rain-water drop from the eaves of certain roofs on the plaintiff's land on to the defendant's land adjoining, and of having the eaves of such buildings project over the defendant's land, and complained that the defendant wrongfully removed the said eaves and built upon the said land close to and higher than the said roofs, so as to prevent the said eaves from projecting over the said land, and the rain-water from dropping from the said eaves on the said land, &c.

Fourth count for negligence by the defendant in erecting certain buildings in close proximity to buildings of the plaintiff, so that the walls and roof of the plaintiff's buildings were injured and the spouts for carrying off the rain-water from the said roof were damaged.

Pleas (inter alia): Third plea to the third count denying that the plaintiff was entitled as alleged.

Fifth plea to the fourth count alleging that the plaintiff had wrongfully placed the spouts and part of the roof of plaintiff's buildings, so that they overhung defendant's land, wherefore defendant removed the same, doing no unnecessary damage, &c.

Issues.

At the trial before Quain, J., at the Nottingham Spring Assizes, the facts appeared to be as follows:—The plaintiff and defendant

were owners of adjoining properties, and it was not denied that the plaintiff had become entitled by user to a right of having the eaves, of buildings on his land project over the defendant's land, but the plaintiff had some short time before the action pulled down the buildings that had formerly stood on his land and rebuilt them, and in so doing had carried the wall on which the projections had been to a greater height than the old building, and so increased the height of the eaves from the ground by three or four courses of bricks. There was no alteration in the character of the eaves save the slightly increased height, nor was there anything to shew that the water fell from the eaves in a different manner from that in which it had previously fallen so as to render the servitude more onerous. The defendant had thereupon removed some of the spouting of plaintiff's building and put back the eaves to make room for buildings which she erected on her own land. On these facts the verdict was entered for the plaintiff for 40s., leave being reserved to move to enter it for the defendant on the ground that the plaintiff had lost his right to have his eaves project over defendant's land by raising his roof.

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A rule nisi having been accordingly obtained,—

Nov. 16, 1872. *Field, Q.C.*, and *Kennedy*, shewed cause :—There is nothing to shew that in fact the servitude was made more onerous by the raising of the roof. The rule of the civil law appears to have been that the eaves might not be lowered but might be raised, the presumption being that the servitude would thereby, if anything, be made less onerous (see the citations in *Gale on Easements*, 4th ed., 559). In *Thomas v. Thomas* (1), which is almost on all fours with the present case, it seems to have been laid down that in order to extinguish the easement there must be a substantial alteration of its character making it more onerous to the servient tenement. [They cited also *Hall v. Swift* (2); *Hale v. Oldroyd* (3).]

Cave and *J. C. Lawrance* supported the rule. The point seems to have been very slightly discussed in *Thomas v. Thomas* (1), and the present case cannot be considered as concluded by that decision.

(1) 2 C. M. & R. 34.

(2) 4 Bing. N. C. 381.

(3) 14 M. & W. 789.

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This easement differs from many other easements, in that it involves a continuous enjoyment of the servient tenement. The projection of the eaves over the neighbouring land is a trespass to such land: *Fay v. Prentice* (1) on the principle, *cujus est solum ejus est usque ad cœlum*. What plaintiff claims to do is to remove his eaves from one place and commit a fresh trespass in another place. This he is not entitled to do. It is clear from many cases that the right to make any alteration in the circumstances of the easement is subject to the condition that no greater burthen is thrown on the servient tenement, as, for instance, in *Garritt v. Sharp* (2). The defendant's right of building is restricted by raising the eaves. The same rule does not apply to the present case as to the cases of watercourses and lights. In those cases no doubt, if there is no substantial variation of the mode of enjoyment, the easement remains, but in neither of those cases is the inception of the easement a trespass. The owner of the dominant tenement cannot, in the case of an easement the inception of which is a trespass, alter the character of the easement so as to gain a different right from that which he had before, by committing a fresh trespass.

Field, Q.C., referred to *Pickering v. Rudd*. (3)

Cur. adv. vult.

Feb. 24, 1873. The judgment of the Court (Bovill, C.J., Grove and Denman, JJ.), was delivered by

GROVE, J. This action was tried before Quain, J., at the Nottingham Spring Assizes, 1872, when a verdict was found for the plaintiff, subject to a point reserved upon the 3rd count of the declaration, which was for an interference with a right of eaves-dropping from a roof of the plaintiff upon the defendant's premises. A rule was subsequently obtained by Mr. Cave, on the part of the defendant, to enter the verdict for her upon the issues on this point, on the ground that plaintiff, by raising his roof, had lost the right to project his eaves and gutter over the defendant's land, and that is the only point which is open to the defendant on the present rule. The question was reserved at the trial, in order to enable the defendant to take the opinion of the Court upon the point

(1) 1 C. B. 828.

(2) 3 A. & E. 325.

(3) 4 Camp. 219.

raised in *Thomas v. Thomas*. (1) But for the alteration the right to the easement was established by the evidence and the verdict of the jury. In 1867 the plaintiff made some alteration in his building, by which the eaves were raised higher by three or four courses of bricks, but the extent of projection of the eaves remained as before the alteration. Things being in this state, the defendant shortly before the time of the action removed some spouting, and put back the eaves to make room for some buildings which she erected, and thereby damaged the plaintiff by causing the water which had flowed off to percolate into crevices, and obliging him to construct a new gutter along the roof. It was contended by Mr. Cave, on behalf of the defendant, that by the change in the position of the eaves in 1867, the mode of enjoyment was changed and the easement destroyed. Mr. Field, on the other hand, contended, on the authority of *Thomas v. Thomas* (1), that there being no substantial variance in the enjoyment the right to the easement was not affected. In that case, which was very similar to the present, and not distinguishable in principle from it, it was held that the raising a wall about three feet, from which water dropped on the servient tenement, and also slightly increasing the projection by substituting thatch for pantiles, did not destroy the easement. It was, however, argued by Mr. Cave that, on the principle of *ejus est solum ejus est usque ad cælum*, there was a trespass in this case which the person trespassed on had a right to abate. Mr. Field, *contrâ*, contended that the point did not arise upon the rule, and that in the case of *Pickering v. Rudd* (2) Lord Ellenborough held, that for nailing a board so as to overhang the plaintiff's close the proper remedy was case and not trespass; and, assuming the point as to trespass to be open to the defendant upon this rule, which was granted only on the point reserved at the trial, the original projection would seem to be the real trespass, and the projection above it a mere user of the space taken possession of by such trespass. The real and indeed the only point reserved, however, was whether the easement was destroyed by the alteration. It is difficult to see how the mere raising of the eaves, which would, if anything, cause the water falling from them to become more dispersed, could affect injuriously the defendant's property. No real

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(1) 2 C. M. & R. 34.

(2) 4 Camp. 219.

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difference was pointed out to us in the effect of the slight raising of the height of the eaves. It did not appear that any greater burthen was thereby cast upon the servient tenement, and in the civil law it was considered that the raising of the eaves diminished instead of increasing the burthen of the servitus in the passage cited by Mr. Field.

It appears to us that to hold that any, even the slightest, variation in the enjoyment of an easement would destroy the easement would virtually do away with all easements, as by the effect of natural causes some change must take place. Thus water percolating or flowing would produce some wear and tear, and alter the height or width of the conduit; so would weather, alterations of heat and cold, &c. In the case of ancient lights, changes in the transparency of glass, wear and tear of frames, growth of shrubs, &c., would produce effects which would vary the character of the enjoyment. In the user of a footpath the footsteps would never be on the same line, or confined accurately to the same width of road. We are of opinion that the question here, as in *Hall v. Swift* (1) and other cases, is, whether there has been a substantial variance in the mode of or extent of user or enjoyment of the easement, so as to throw a greater burthen on the servient tenement. In the language of Sir Richard Kindersley, which was adopted by the Master of the Rolls in the late case of *Heath v. Bucknell* (2), there must be an additional or different servitude, and the change must be material either in the nature or in the quantum of the servitude imposed. It was not suggested, nor was there any evidence that any such additional burthen had been cast upon the defendant's premises by the alteration in this case, and therefore we are of opinion that the defendant is not entitled to have the verdict entered in her favour upon the issues in question, and that the present rule must be discharged.

Rule discharged.

Attorneys for plaintiff: *Purkis & Perry, for William Williams, Nottingham.*

Attorneys for defendant: *Field & Roscoe, for Enfield & Dowson, Nottingham.*

(1) 4 Bing. N. C. 381.

(2) Law Rep. 8 Eq. at p. 5.

ROPER AND ANOTHER v. JOHNSON.

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Feb. 6.

Contract—Measure of Damages in an Action for Breach of a Contract for Forward Monthly Deliveries—Breach before the Time for complete Performance.

The defendant in April agreed to sell and the plaintiffs to buy 3000 tons of coal, at 8s. 6d. per ton, "to be taken during the months of May, June, July, and August." No coal having been taken by the plaintiffs in May, the defendant wrote on the 31st of that month desiring the plaintiffs to consider the contract cancelled. The plaintiffs did not assent to this; but on the 11th of June the defendant definitively refused to deliver any coal, and on the 3rd of July the plaintiffs brought an action for this breach.

At the trial, which took place on the 13th of August, the plaintiffs proved that the price of coal had risen during the whole period since the beginning of May, and was still rising. No evidence was given to shew whether the plaintiffs could have gone into the market and obtained a new contract for coals.

Held, that in the absence of evidence on the part of the defendant that the plaintiffs could have obtained a new contract on such terms as to mitigate their loss, the true measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivery, notwithstanding that the last period had not elapsed when the action was brought, or when the cause was tried.

DECLARATION that the plaintiffs bargained and agreed with the defendant to buy of him, and the defendant agreed to sell to the plaintiffs, 3000 tons of coal, at 8s. 6d. per ton, less 2½ per cent. discount, to be delivered during the months of May, June, July, and August, 1872, at the defendant's colliery, Hindley Green, St. Helens; that all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to have the coal delivered as aforesaid; yet the defendant did not deliver the coal to the plaintiffs, and refused to deliver the same; whereby the plaintiffs had been deprived of the profit which would have accrued to them from the delivery of the same, and had been prevented from performing a contract made by them with W. B. for the sale to him of the coal at greatly increased prices, which last-mentioned contract was made on the faith of the agreement with the defendant; and by reason of the premises the plaintiffs had become and were liable to W. B. for damages for the non-performance of the last-mentioned contract. Claim, 1000l.

Pleas, 1, that it was not agreed as alleged; 2, a denial of the

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alleged breach ; 3, that before breach the plaintiffs exonerated and discharged the defendant from performance of the agreement ; 4, that the plaintiffs were not ready and willing to accept the goods according to the terms of the agreement ; 5, that the plaintiffs were not ready and willing to pay for the goods according to the terms of the agreement ; 6, that the alleged agreement was contained in certain letters written by and between and signed by the plaintiffs and the defendant respectively, and was made subject to certain terms and conditions then agreed upon by and between the plaintiffs and the defendant, and contained therein, that is to say, upon the terms or conditions that the plaintiffs should pay cash for the goods before delivery thereof by the defendant, or should furnish the defendant with references satisfactory to the defendant of the plaintiffs' solvency and means ; that although all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the defendant to a performance by the plaintiffs of their promise, yet the plaintiffs did not nor would pay to the defendant cash for the goods before delivery thereof, and did not nor would furnish the defendant with references satisfactory to the defendant of the plaintiffs' solvency and means ; and that the defendant was prevented from performing the agreement on his part by the said neglect and default of the plaintiffs. Issue thereon. (1)

The cause was tried before Brett, J., at the last Summer Assizes at Liverpool. The plaintiffs are colliery proprietors and coal merchants carrying on business at Ackhurst Hall Colliery, near Wigan, and also at Manchester. The defendant is a colliery proprietor at Hindley Green, St. Helen's. In April, 1872, a negotiation took place between the plaintiffs and the defendant for the sale by the latter to the former of 3000 tons of coal to be delivered in equal monthly quantities during the months of May, June, July, and August. Subsequently, the following correspondence passed between the parties :—

April 18th, 1872. Defendant to plaintiffs: "I beg to inform you that my lowest price for coal at pit is 8s. 6d. per ton, less 2½ per

(1) There was also a demurrer to the sixth plea : but by order of Willes, J., the issues of fact were first tried.

cent. discount; but could not bind myself to supply the quantity named."

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April 25th, 1872. Defendant to plaintiffs: "According to my promise to-day, I now offer you 3000 tons of coal to be delivered during the months of May, June, July, and August, at 8s. 6d. per ton, less 2½ per cent discount, at my colliery, Hindley. This offer to remain open until Monday next."

April 26th, 1872. Plaintiffs to defendant: "We hereby accept your offer of 3000 tons of Wigan, 4 and 5 foot coal, at 8s. 6d. per ton, less 2½ per cent. discount, at your siding, Hindley Green, to be taken during the months of May, June, July, August, and September next. We have added September, in accordance with the arrangement entered into personally yesterday."

April 27th, 1872. Defendant to plaintiffs: "I can only deliver during the months of May, June, July, and August, and to be exempt in case of strikes and accidents. As you are strangers to me, I shall require cash or a satisfactory reference."

April 29th, 1872. Plaintiffs to defendant: "We agree to take delivery in the months named, viz. May, June, July, and August, although we think it rather strange, after the previous understanding. With regard to references, you had better make your own inquiries about us; and, if they do not result satisfactory, we will pay cash."

April 30th, 1872. Plaintiffs to defendant: "Your favour of this morning is to hand. (1) We think you are giving yourself unnecessary trouble. We thought you would make the usual inquiry through your bankers. However, we beg to refer you to the Manchester and Liverpool District Bank, Wigan. We purpose taking the coal in regular daily quantities in your waggons, and propose sending you instructions in the course of next week."

May 31st, 1872. Defendant to plaintiffs: "As you have not taken the coal according to arrangement, you must consider the contract cancelled."

June 1st, 1872. Plaintiffs to defendant: "Yours of the 31st ultimo duly received, in which you say that the contract for 3000 tons coal must be considered cancelled. In reply, we beg to

(1) The letter referred to was not put in.

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say that we are not aware of any circumstances to justify the same, and therefore consider the contract as still in force."

June 10th, 1872. Plaintiffs to defendant: "We beg to inform you that we have ordered twenty-five waggons to be sent to your colliery, which be good enough to load and forward to Garston to our order. The waggons will be kept constantly running, so that deliveries will be steadily taken."

June 11th, 1872. Defendant to plaintiffs: "I am in receipt of your's of yesterday, and beg to state I shall not load your waggons if sent to my colliery. The terms of my offer in my letter to you of the 25th of April last not having been accepted, I cannot now supply you with coal until the price and conditions are first arranged. I left the matter open from the 25th of April to the 31st of May, to enable you to accept my proposal. You not having done so, I wrote you on the latter date to the effect that you might consider our negotiation as to the 3000 tons at an end."

June 12th, 1872. Plaintiffs to defendant: "We are in receipt of your favour of the 11th. The 3000 tons of coal bought from you are already sold, and we have sent waggons to your colliery to be filled; in default of which, we shall charge you with demurrage, as we consider that nothing has occurred to invalidate the contract."

June 15th, 1872. Plaintiffs to defendant: "We have forwarded to Swan Lane Colliery nine wagons, which arrived at your siding yesterday. Be good enough to load them on our account, and give them quick dispatch, as we have a vessel waiting to be filled."

June 19th, 1872. Plaintiffs' attorneys to defendant: "Messrs. Roper & Co have consulted us upon the subject of your breach of contract relative to 3000 tons of coal; and we beg to inform you that, unless the amount of the damage sustained by our clients, 300l., be paid to us by Friday next, a writ will be issued against you."

The defendant replied, referring to his solicitor; and the writ in this action was issued on the 3rd of July.

The plaintiffs claimed to be entitled to damages estimated according to the advance in the market-price of coal at the

various periods at which the coal contracted for should have been delivered, viz. in equal monthly quantities, 750 tons in each of the four months of May, June, July, and August. It was proved that, from the 14th to the 29th of May, the market-price of coal had advanced (in Liverpool where the contract was made,) 6*d.* per ton; between the 29th and 31st, 1*s.* 6*d.* per ton; between the 1st and 30th of June, 2*s.* per ton; between the 1st and 15th of July, 2*s.* 6*d.* per ton; between the 15th and 19th, 3*s.* 6*d.* per ton; between the 19th of July and the 15th of August, 5*s.* per ton; and between that day and the 31st of August, it was estimated that the rise would be 10*s.* per ton. *The trial took place on the 13th of August.* In addition to this, the plaintiffs claimed a sum for waggon expenses or demurrage (1), their whole claim amounting to 505*l.* 2*s.* 5*d.*

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For the defendant it was insisted that, the plaintiffs not having taken any coal in all the month of May, the defendant was entitled to declare the contract at an end; that, assuming the plaintiffs to be entitled to recover anything, the utmost damages they could claim would be the difference between the contract-price and market-price of coal on the day on which the defendant refused to perform the contract; and that, at all events, they were not entitled to speculate upon the possible rise in the market after the day of trial.

A verdict was taken for the plaintiffs for 505*l.* 2*s.* 5*d.*, subject to leave reserved to the defendant to enter a verdict for him or a nonsuit, if the Court should be of opinion that the plaintiffs, not having performed the contract by taking any coal in May, were not entitled to recover; or to reduce the damages to such sum as the Court should direct.

A rule having been obtained accordingly,

Holker, Q.C., and *Dixon*, shewed cause. The first branch of the rule is disposed of by *Simpson v. Crippin* (2), which was decided in the Queen's Bench after this rule was granted. There, the defendants agreed to supply the plaintiffs with from 6000 to 8000 tons of coal, to be delivered into the plaintiffs' waggons at

(1) This claim was abandoned on the argument of the rule.

(2) Law Rep. 8 Q. B. 14.

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the defendants' collieries, in equal monthly quantities, during the period of twelve months, at 5s. 6d. per ton. During the first month the plaintiffs sent waggons to receive only 158 tons. Immediately after the first month had expired, the defendants informed the plaintiffs that, as the plaintiffs had taken only 158 tons, the defendants would annul the contract. The plaintiffs refused to allow the contract to be annulled, but the defendants declined to deliver any more coal. The Court held that the breach by the plaintiffs in taking less than the stipulated quantity during the first month did not entitle the defendants to rescind the contract.

[*Herschell, Q.C.*, admitted that he could not in this Court argue in support of the first branch of the rule, but must confine himself to the reduction of damages.]

There was a complete contract on the 29th, or at the latest on the 30th of April, under which the plaintiffs bound themselves to take and the defendant bound himself to deliver 750 tons of coal in each of the months of May, June, July, and August. The jury have assessed the damages at the difference between the contract-price and the market-price at each of the periods when the coal ought to have been delivered. It will be said that the damages should have been assessed at the difference of price on the 31st of May, when the defendant intimated to the plaintiffs that they must consider the contract cancelled. But the defendant clearly had no right to repudiate the contract because the plaintiffs had not taken any coal in the month of May. That is settled by *Simpson v. Crippin*. (1) If the plaintiffs had waited until the end of August before they brought their action, it would be conceded that they would have been entitled to recover the whole damages which the jury have given. Why should the fact of the action having been brought before that time, upon the principle laid down in *Hochster v. De la Tour* (2) and *Danube and Black Sea Company v. Zenos* (3), the defendant having definitively refused to perform the contract, make any difference? In *Simpson v. Crippin* (1), the action was brought at the end of the sixth

(1) Law Rep. 8 Q. B. 14.

(2) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

(3) 11 C. B. (N.S.) 152; 13 C. B. (N.S.) 825; 31 L. J. (C.P.) 84, 284.

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month. In the then state of the market, it was impossible for the plaintiffs to obtain a new forward contract upon such favourable terms: the ordinary rule, therefore, cannot apply to such a case.

In *Brown v. Muller* (1), the plaintiff bought of the defendant 500 tons of iron, to be delivered in about equal proportions in September, October, and November, 1871. In August, 1871, the defendant gave notice that he did not intend to deliver any iron. In December, the plaintiff commenced an action for non-delivery, and claimed as damages the difference on the 30th of November between the contract and market prices of the iron: and it was held that the proper measure of damages was the sum of the differences between the contract and market prices of one third of 500 tons on the 30th of September, the 31st of October, and the 30th of November respectively. It is true that the period for the delivery of the last of the iron had expired at the time of action brought; but in all other respects that case is wholly undistinguishable from the present. Kelly, C.B., in giving judgment, says (2): "The case of *Frost v. Knight* (3) has been referred to as shewing that there is a difference between cases where the contract is treated as still subsisting and where it is treated as at an end. Now, the plaintiff might, if he had so elected, have treated the contract as at an end when the defendant announced his intention to break it. But that is a matter of election on the plaintiff's part; and, even although he had elected thus to treat the contract, yet, in considering the question of damages, they would still be estimated with reference to the times at which the contract ought to have been performed, that is, in this case, at the end of the months of September, October, and November." Martin, B., says: "In deference to authority, I come to the same conclusion. But, for my part, I should have been disposed to think that the damages ought to have been estimated once for all when a complete breach of the contract had been committed. But the cases of *Boorman v. Nash* (4) and *Josling v. Irvine* (5) decide the matter." And Channell, B., said: "I by no means

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(1) Law Rep. 7 Ex. 319.

(4) 9 B. & C. 145.

(2) Law Rep. 7 Ex. at p. 323.

(5) 6 H. & N. 512; 30 L. J. (Ex.)

(3) Law Rep. 5 Ex. 322; in error, 78.

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desire to interfere with the rule that, where there is a contract to deliver goods on a specific day, the proper measure of damages is the difference on that day between the market and contract prices. But, where the contract is to deliver in parcels at definite but different times, as here, at the end of the three months of September, October, and November, there I think the difference should be taken at the end of each period. The cases of *Boorman v. Nash* (1) and *Josling v. Irvine* (2) are express on this point."

Herschell, Q.C., and *Baylis*, in support of the rule. Having elected to treat the contract as at an end by bringing their action (on the 3rd of July), the damages are to be assessed with reference to the price at which the plaintiffs might have gone into the market on that day and obtained a contract for coal of the particular description.

[BRETT, J. What evidence was there, or what probability, that they could have obtained a contract for forward deliveries at the market-price of that day?]

The onus of proving the damage they had sustained lay upon the plaintiffs. *Brown v. Muller* (3) is no authority here: the action there was not brought until the period for the last delivery had elapsed: consequently, the dicta relied on were unnecessary and obiter. And even there, *Bramwell, B.*, who had left the Court before the judgment was pronounced, seems to have thought that the plaintiff ought to have endeavoured to get a new contract as soon as there was a complete breach. He says in the course of the argument (4): "Quite apart from *Hochster v. De la Tour* (5), there was an absolute breach at the end of September. Ought not the plaintiff, either when the defendant repudiated or at the end of the first month, to have endeavoured to provide himself with another contract?" *Hochster v. De la Tour* (5) was the first case that started this description of question. A different rule was acted upon in *Phillpotts v. Evans*. (6)

[KEATING, J. In the earlier part of his judgment in *Brown v. Muller* (7), *Kelly, C.B.*, says that the plaintiff was not bound to

(1) 9 B. & C. 145.

(2) 6 H. & N. 512; 30 L. J. (Ex.) 78.

(3) Law Rep. 7 Ex. 319.

(4) Law Rep. 7 Ex. at p. 320.

(5) 2 E. & B. 678; 22 L. J. (Q.B.)

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(6) M. & W. 475.

(7) Law Rep. 7 Ex. at p. 322.

go into the market when the first breach took place and endeavour to obtain a similar contract, which might or might not turn out to be beneficial, and which might in one event give the defendant a right to complain.

BRETT, J. You are arguing for what Martin, B., wished was the rule; but all the three judges gave deliberate judgments the other way.]

This point did not arise in that case. Here, the Court may fairly assume that the plaintiffs might have obtained a contract at the price of the day on which the action was brought; consequently, the damages should be estimated, at the highest, at an advance of 2s. 6d. per ton on 2250 tons; the plaintiffs not being entitled to claim in respect of the non-delivery of 750 tons in May. Even according to the plaintiffs' view, there was no actual advance, at the time the action was commenced, beyond 5s. per ton. Contracts for forward delivery are by no means rare. Such contracts were made in *Hoare v. Rennie* (1) and *Simpson v. Crippin*. (2)

C. Russell, Q.C., intimated his willingness to consent to a reduction of the damages, at the suggestion of the Court, to 400*l*.

KEATING, J. The question in this case arises upon a contract by which the defendant agreed to deliver coals to the plaintiffs at certain specified periods, at 8s. 6d. per ton. The quantity to be delivered was 3000 tons, and the deliveries were to take place in the months of May, June, July, and August, 1872. There was some controversy as to the facts; but there can be no doubt that the defendant, soon after the contract was entered into, intimated his determination not to perform it; and it seems to be agreed that, at all events, that repudiation of the contract was accepted by the plaintiffs on the 3rd of July, when they brought this action for the non-performance of it. The difficulty as to the measure of damages, or rather as to the principle on which the damages are to be assessed, arises from the circumstance of the time for delivery of the coal extending over the whole of the month of August. Had the action been delayed until after the expiration of the time for the completion of the contract, we should have entertained but

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(1) 5 H. & N. 19; 29 L. J. (Ex.) 73.

(2) Law Rep. 8 Q. B. 14.

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little doubt; for, the case would then have been distinctly within the authority of *Brown v. Muller* (1), and we should have considered ourselves bound by that decision. But the difficulty here arises from the fact of the action having been brought on the 3rd of July. In *Brown v. Muller* (1) it was clearly decided that, where the contract is for the delivery of goods in equal proportions in a given number of months, and the action for non-delivery is not brought until after the expiration of the period stipulated for the last delivery, the proper measure of damages is the sum of the differences between the contract and market-prices on the last day of each month respectively. That was the proper measure of damages there. But here the breach occurred before the end of the period over which the contract extended; and the question is, what is the proper measure of damages in such a case. Mr. Herschell in his very able argument insisted that the true measure is the loss which had resulted to the plaintiffs at the time of such breach, and that the mode of ascertaining the amount of such loss is to inquire upon what terms the plaintiffs could have gone into the market and obtained a similar contract on that day. That, it is said, is the true and the only measure of damages in such a case; and hence it is contended that it was incumbent on the plaintiffs here to give evidence of loss ascertained in that manner, by shewing what would be the difference between the contract-price and the price at which they could have obtained a similar contract on the day of the breach, or that they were unable to obtain such a contract at all. Now, it appears to me that the plaintiffs cannot be called upon to give evidence of that sort. The rule laid down by the Court of Exchequer in *Brown v. Muller* (1) is to be applied to the present case *cy près*. The judges there in reality did go into the question which arises here; and the Lord Chief Baron, and Martin and Channell, BB., pronounced opinions which are distinctly in favour of the plaintiffs in this case. Mr. Herschell is undoubtedly justified in saying that those judgments are to a certain extent *obiter*. Still they come to us recommended by very high authority; and I am disposed to concur in them. The difficulty which presents itself here is introduced by the comparatively recent case of *Hochster v. De la Tour* (2), the first case

(1) Law Rep. 7 Ex. 319.

(2) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

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which decided that, in the case of an executory contract, the refusal of one party to perform the contract would justify the other in at once treating such refusal as a breach, and suing for damages. That case has been distinctly recognized on many subsequent occasions, and we must now assume it to be law. It has undoubtedly introduced a difficulty in the assessment of damages in similar cases. It was followed in *Frost v. Knight* (1) in the Court of Exchequer, and the Exchequer Chamber (2) also professed to act upon it. It was not necessary in either case to decide what the damages actually were in moneys numbered. But we are not left without some light upon the subject ; for, Cockburn, C.J., lays down the rule which I for one am prepared to act upon here, and in the same terms in which it was laid down by the three judges in *Brown v. Muller* (3), viz. that the periods of time at which the difference of price on a contract of this kind is to be taken, are the periods of time at which the deliveries would have taken place had the contract been performed. Cockburn, C.J., in delivering what must be assumed to be the judgment of the whole Court of Exchequer Chamber in *Frost v. Knight* (4), says: "The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. Dela Tour* (5) and *The Danube and Black Sea Company v. Zenos* (6) on the one hand, and *Avery v. Bowden* (7), *Reid v. Hoskins* (8), and *Barrick v. Buba* (9), on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but, in that case, he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to

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(1) Law Rep. 5 Ex. 322.

(2) Law Rep. 7 Ex. 111.

(3) Law Rep. 7 Ex. 319.

(4) Law Rep. 7 Ex. at p. 112.

(5) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

(6) 13 C. B. (N.S.) 825; 31 L. J. (C.P.) 284.

(7) 5 E. & B. 714; 26 L. J. (Q.B.) 3.

(8) 6 E. & B. 953; 26 L. J. (Q.B.) 3.

(9) 2 C. B. (N.S.) 563; 26 L. J. (C.P.) 280.

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(H) 5 C. B. (N.S.) 238.

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take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time." And he adds this qualification,—“ Subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.” That seems to me to get rid of the argument urged on the part of the defendant, viz. that the true and only measure of damages in such a case as this is, the loss which the plaintiffs have sustained in consequence of the defendant's failure to perform the contract; that the mode of estimating that loss is by ascertaining the difference between the contract-price and the price at which the plaintiffs might have obtained a new contract on the day of the admitted breach; and that it was for the plaintiffs to shew what that difference was, either by having entered into such a contract, or by proof of their inability to obtain one. It seems to me that, when the plaintiffs have shewn that there has been a distinct breach of the contract on the part of the defendant, and have further shewn that at the periods at which the coal should have been delivered, they could only have obtained them at an advanced price, they were entitled to the difference between that advanced price and the contract-price, unless the defendant gave evidence that another similar contract might have been obtained on more mitigated terms. For instance, if there had been a fall in the market, or any other circumstance calculated to diminish the loss, it would be for the defendant to shew it. This is the best conclusion I have been able to arrive at; and it has the support of the opinions of three judges of the Exchequer in *Brown v. Muller*. (1) I think it is the better and the safer rule; though I am free to confess that the matter is by no means divested of difficulty,—a difficulty occasioned by the novel doctrine introduced by the case of *Hochster v. De la Tour*. (2) But it seems to me that it is a rule which is more likely to avoid

(1) Law Rep. 7 Ex. 319.

(2) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

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those difficulties than the other rule which has been suggested by Mr. Herschell.

The rule will, therefore, be made absolute to reduce the damages to 400*l.*, the sum agreed upon between the parties.

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BRETT, J. This is an action brought upon a contract for the purchase and sale of marketable goods, whereby the defendant undertook to deliver them in certain quantities at certain specified times; and the action is brought for the non-performance of that contract. Now, in ordinary cases, the contract is to deliver the goods on a specified day, and there is no breach until that day has passed. In the case of marketable goods, the rule as to damages for breach of the contract to deliver is, the difference between the contract-price and the market-price on the day of breach. That is perfectly right when the day for performance and the day of breach are the same. Another form of contract is, as in *Brown v. Muller* (1), to deliver goods in certain quantities on different days. The effect of the judgment in that case is that, the contract being wholly unperformed, there is a breach,—a partial breach,—on each of the specified days; such breaches occurring on the same days as the days appointed for the performance of the several portions of the contract. But the case of *Hochster v. De la Tour* (2) introduced this qualification, that, where one party, before the day for the performance of the contract has arrived, declares that he will not perform it, the other may treat that as a breach. That complication has arisen here: the contract being for the delivery of the goods on future specified days, the defendant has before the time appointed for the last delivery declared that he will not perform the contract, and the plaintiffs have elected to treat that as a breach and to bring their action.

Now, to entitle a plaintiff to recover damages in an action upon a contract, he must shew a breach and that he has sustained damage by reason of that breach. These two are quite distinct. All that *Hochster v. De la Tour* (2) decided was this, that, if before the day stipulated for performance, the defendant declares that he will not perform it, the plaintiff may treat that declaration as a breach of the contract, and sue for it. Now comes the question whether in

(1) Law Rep. 7 Ex. 319.

(2) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

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such a case as this there is to be a different rule as to proof of the amount of damage which the plaintiff has suffered. The general rule as to damages for the breach of a contract is, that the plaintiff is to be compensated for the difference of his position from what it would have been if the contract had been performed. In the ordinary case of a contract to deliver marketable goods on a given day, the measure of damages would be the difference between the contract-price and the market-price on that day. Now, although the plaintiff may treat the refusal of the defendant to accept or to deliver the goods before the day for performance as a breach, it by no means follows that the damages are to be the difference between the contract price and the market-price on the day of the breach. It appears to me that what is laid down by Cockburn, C.J., in *Frost v. Knight*, in the Exchequer Chamber (1), involves the very distinction which I am endeavouring to lay down, viz. that the election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages; and that, when you come to estimate the damages, it must be by the difference between the contract-price and the market-price at the day or days appointed for performance, and not at the time of breach. Now, how does the Chief Justice deal with the matter? He deals first with the case of an action brought after the day for performance. He says: "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but, in that case, he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it." He then treats of the other case: "On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the

(1) Law Rep. 7 Ex. 111.

non-performance of the contract at the appointed time," that is, from non-performance of the contract at the time or times appointed for its performance. That clearly negatives Mr. Herschell's argument, and gives the rule for the assessment of damages in the way I have stated, viz. that they must be such as the plaintiffs would have sustained at the day appointed for performance of the contract. Then he goes on and shews the real distinction between the cases he has put,—“Subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.” He says further: “The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote. It is obvious that such a course must lead to the convenience of both parties; and, though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the non-fulfilment of the contract; and, in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been or would have been diminished.” He uses the very term I used in the course of the argument, and which Mr. Herschell objected to, viz. “*ought to have done*.” It seems to me to follow from that ruling that the plaintiffs here did all they were bound to do when they proved what was the difference between the contract-price and the market-price at the several days specified for the performance of the contract, and that *primâ facie* that is the proper measure of damages; leaving it to the defendant to shew circumstances which would entitle him to a

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mitigation. No such circumstances appeared here: there was nothing to shew that the plaintiffs ought to have or could have gone into the market,—a rising market,—and obtained a similar contract. But I cannot help thinking that the Chief Justice's judgment in the case last referred to goes further, and says in effect that the plaintiffs were not bound to attempt to get a new contract. It was upon precisely the same argument that the Chief Baron in *Brown v. Muller* (1) decided against Mr. Herschell that the plaintiff there, as a reasonable man, was not bound to make a forward contract. Baron Martin held the same, though apparently with some reluctance: but no doubt is expressed in the judgment of Baron Channell. If we had been altogether without authority, I should have come to the same conclusion. But I think we are bound by the authority of *Frost v. Knight* (2), and *Brown v. Muller*. (1).

GROVE, J. I have come to the same conclusion, notwithstanding that I have entertained considerable doubt during the argument, particularly upon the first proposition, as to which I desire not to pronounce any opinion. Upon the second point I entirely agree with the rest of the Court, viz. whether there was any evidence upon which we could act. As to the first question I probably should have felt myself bound by the opinions expressed by the judges in *Brown v. Muller* (1), though strictly obiter; for the action there was not brought until after the expiration of the last period stipulated for the delivery of the iron, while here, there was evidence that the plaintiffs had accepted the defendant's renunciation of the contract, and had assented to its being put an end to at the latest on the 3rd of July. But, taking it upon Mr. Herschell's own view, his second proposition clearly was not made out. There was an admitted breach: and the question was, at what extra cost to themselves could the plaintiffs then have placed themselves in the same position they would have been in if the defendant had performed his contract. Was there any evidence upon which the Court could rely in support of the proposition that the plaintiffs could at the time of the admitted breach have gone into the market and made a similar contract? I cannot gather from the notes of the learned judge who tried the cause that there was any

(1) Law Rep. 7 Ex. 319.

(2) Law Rep. 7 Ex. 111.

evidence upon which the jury could have come to such a conclusion. I agree that the market-price, though commonly used as a test, is not the only one. If in this case the defendant could have shewn that the plaintiffs might have gone into the market on the day of breach and made a forward contract at the then market-price, and that they had not attempted to avail themselves of the opportunity, the jury might undoubtedly have taken that into consideration in reduction of the plaintiffs' loss; and we might have done so too. The case would then have been within the principle of *Hochster v. De la Tour*. (1) Lord Campbell there says (2): "It is much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Instead of remaining idle, and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract." And further on he says (3): "An argument against the action before the 1st of June (the day on which the employment of the plaintiff as courier was to commence) is urged from the difficulty of calculating the damages; but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial." Now, if there had been any materials here to shew that at the time of the breach the plaintiffs could without extraordinary trouble have entered into a forward contract at the then market price, the jury might have taken them into consideration in mitigation of the damages. But there was no such evidence here; and we cannot act upon any conjecture of our own; we can only deal with the evidence as it stood before the jury. There is a different mode of dealing in each particular

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(1) 2 E. & B. 678; 22 L. J. (Q.B.)

(2) 2 E. & B. at p. 690.

(3) 2 E. & B. at p. 691.

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trade: but, upon a rule to reduce the damages, we can only take notice of the ordinary incidents of a contract. The expression "mitigation" used in the judgment of Cockburn, C.J., in *Frost v. Knight* (1), rather shews that the onus of proof lies on the defendant. The plaintiffs having made out a *prima facie* case of damages, actual and prospective, to a given amount, the defendant should have given evidence to shew how and to what extent that claim ought to be mitigated. No such evidence was attempted to be given. It is entirely upon the absence of that evidence that I rest my judgment. The other point is one deserving of serious consideration. The opinions of Kelly, C.B., and Channell, B., upon the point, in *Brown v. Muller* (2), are clear in favour of the plaintiffs; and Martin, B., did not dissent, though he seems to have assented with some reluctance.

KEATING, J. The result will be that the rule will be made absolute to reduce the damages to 400*l.*, but discharged as to the rest; and each party, we think, should bear his own costs of the rule.

Rule absolute.

Attorneys for plaintiffs: *Sewell & Edwards, for Henwood & Marley, Manchester.*

Attorney for defendant: *John Richardson, Manchester.*

(1) Law Rep. 7 Ex. 111.

(2) Law Rep. 7 Ex. 319.

THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY,
APPELLANTS; THE BOARD OF WORKS FOR THE WANDSWORTH
DISTRICT, RESPONDENTS.

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Act of Parliament, Construction of—Inconsistent Provisions—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20)—London, Chatham, and Dover Railway (Metropolitan Extension) Act, 23 & 24 Vict. c. clxxvii.

By s. 65 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), it is enacted that, "where, under the provisions of this or the special Act, or any Act incorporated therewith, the company are required to maintain or keep in repair any bridge, &c., executed by them, it shall be lawful for two justices, on the application of the surveyor of roads, &c., complaining that any such work is out of repair, after not less than ten days' notice to the company, to order the company to put such work into complete repair within a period to be limited for that purpose,"—under a penalty of 5*l.* per day.

By s. 2 of the London, Chatham, and Dover Railway (Metropolitan Extension) Act, 1860 (23 & 24 Vict. c. clxxvii), the general Acts of 1845, 8 & 9 Vict. cc. 18, 20, except in so far as their provisions are "expressly varied or excepted" by the special Act, are incorporated with the special Act: and s. 90 contains provisions with reference to carrying the railway by means of bridges over certain roads, including the Clapham Road.

By s. 97 of the special Act it is enacted that, if the company shall fail to repair and keep in good and complete repair to the satisfaction of the surveyor the bridges, &c., and other works connected with crossing the roads or footpaths, and if after notice thereof given to the company by or on behalf of the trustees, the company fail for three days to begin such repairs and proceed therein with all reasonable expedition until the same shall be completed, the trustees may repair and make good the same, &c.; and all the costs, charges, and expenses incurred in that behalf by the trustees shall be paid on demand by the company, or, on failure of payment for twenty-one days after such demand, the same may be recovered from the company, with costs, in any court of competent jurisdiction.

Upon an appeal by the company against an order of a magistrate under s. 65 of the general Act, requiring them to put the bridge into complete repair within two calendar months, the question for the opinion of the Court was whether the provisions of the general Act are expressly varied by those of the special Act, so as to render s. 65 of the former inapplicable:—

Held, that they were so varied; but that, inasmuch as the Turnpike Acts, under which the trustees referred to in s. 97 of the special Act acted, had expired, the provisions of the general Act would, upon such determination of the turnpike trust, revive, and consequently that the order of the magistrate was valid.

APPEAL from the decision of a magistrate pursuant to 20 & 21 Vict. c. 43.

1. Upon the hearing of a complaint preferred by the respond-

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ents against the appellants under s. 65 (1) of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), that a certain bridge carrying the London, Chatham, and Dover Railway over the Clapham Road was out of repair and not properly maintained by the appellants, the police-magistrate sitting at the Wandsworth Police Court made an order requiring the appellants to put the bridge into complete repair within two calendar months from the 23rd of February, 1872, the day of the hearing.

2. It was proved that the bridge carrying the London, Chatham, and Dover Railway over the Clapham Road, the same being a public highway within the meaning of s. 46 of the Railways Clauses Consolidation Act, 1845, was out of repair.

3. On the part of the appellants, the London, Chatham, and Dover Railway (Metropolitan Extension) Act, 1860 (23 & 24 Vict. c. clxxvii), being the special Act under the powers of which the railway and bridge in question carrying the railway over the Clapham Road were constructed, was put in.

By s. 2 of the Act it was enacted that, "the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, shall, except in so far as the provisions of those Acts are expressly varied or excepted by this Act, be incorporated with and form part of this Act." Sect. 90 of the said Act contains provisions with reference to carrying the railway by means of bridges over certain roads including the said Clapham Road.

By s. 97 of the said Act it is enacted that, "if and so often as the company shall fail to repair and keep in good and com-

(1) By 8 & 9 Vict. c. 20, s. 65, "where under the provisions of this or the special Act, or any Act incorporated therewith, the company are required to maintain or keep in repair any bridge, fence, approach, gate, or other work executed by them, it shall be lawful for two justices, on the application of the surveyor of roads, or of any two householders, of the parish or district where such work may be situate, complaining that any such work is out of repair, after not less than ten days' notice to the company, to order the

company to put such work into complete repair within a period to be limited for that purpose by such justices; and, if the company fail to comply with such order, they shall forfeit 5*l.* for every day that they fail so to do; and it shall be lawful for the justices by whom any such penalty is imposed to order the whole or any part thereof to be applied, in such manner and by such person as they think fit, in putting such work into repair."

plete repair to the satisfaction of the said surveyor for the time being the bridges, walls, screen walls, fences, sewers, drains, and other works connected with crossing the roads or footpaths, and if after notice given to the company by or on behalf of the trustees, the company fail for three days to begin such repairs and proceed therein with all reasonable expedition until the same shall be completed, the trustees may repair and make good the same, causing as little obstruction to the railway in the progress of such repairs as may be; and all the costs, charges, and expenses incurred in that behalf by the trustees shall be paid, on demand, by the company, or on failure of payment for twenty-one days after such demand the same may be recovered from the company, with full costs of suit, in any court of competent jurisdiction."

The Turnpike Act, under which the trustees referred to in the 97th section above referred to were constituted, has expired (1); but this fact was not proved before the magistrate.

4. On the part of the appellants it was contended that the provisions of the Railways Clauses Consolidation Act, 1845, as regards the 65th section of that Act, are "expressly varied" by those of the London, Chatham, and Dover Railway (Metropolitan Extension) Act, 1860; and that the 65th section of the Railways Clauses Consolidation Act, 1845, is not incorporated with and does not form part of the London, Chatham, and Dover (Metropolitan Extension) Act, 1865, and therefore does not apply.

5. On the part of the respondents it was contended that the provisions of the 97th section of the London, Chatham, and Dover Railway (Metropolitan Extension) Act, 1860, are cumulative only,

(1) The original Surrey and Sussex Roads Act, 25 Geo. 3, c. cxvii, was repealed and re-enacted with some alterations by 42 Geo. 3, c. lxxvii, which was to be in force for twenty-one years. That Act was continued for twenty-one years by 58 Geo. 3, c. lxxvi. These two last-mentioned Acts were repealed and re-enacted by 9 Geo. 4, c. cxx, for twenty years. The 9 Geo. 4, c. cxx, was amended by 12 & 13 Vict. c. xlvii, which was to continue in force during the remainder

of the term granted by the 9 Geo. 4, c. cxx. The 9 Geo. 4, c. cxx, and 12 & 13 Vict. c. xlvii, were repealed and re-enacted by 13 & 14 Vict. c. lxxxv, which was to continue for eleven years. And the 13 & 14 Vict. c. lxxxv was continued by the Annual Turnpike Acts Continuance of 25 & 26 Vict. c. 72, 26 & 27 Vict. c. 94, and 27 & 28 Vict. c. 75, until November 1, 1865, when it ceased to exist, being excepted from continuance by 28 & 29 Vict. c. 107.

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and do not expressly vary the provisions of the Railways Clauses Consolidation Act, 1845, and therefore that the 65th section of the latter Act applies.

The magistrate decided against the appellants.

The question for the opinion of the Court was, whether the provisions of the Railways Clauses Consolidation Act, 1845, are expressly varied by those of the London, Chatham, and Dover Railway (Metropolitan Extension) Act, 1860, so as to render the 65th section of the Railways Clauses Consolidation Act, 1845, inapplicable.

W. G. Harrison, for the appellants, contended that the 65th section of the general Act, 8 & 9 Vict. c. 20, and the 97th section of the subsequent special Act (23 & 24 Vict. c. clxxvii) giving two inconsistent remedies in respect of the same default, the latter, inasmuch as it afforded in itself a complete and perfect remedy, must be held to be an express variation or exception of the subject-matter out of the former enactment, within the rule laid down by Lord Westbury, C., in *Ex parte St. Sepulchre, In re The Westminster Bridge Act* (1); and consequently that the later must override the prior enactment. He referred to ss. 94, 96, and 98 of the special Act, which have reference to works done in respect of roads, and which he submitted substituted the judgment of the surveyor of the road trustees for that of the magistrate; otherwise there would be two separate tribunals appointed for the determination of the same matter.

Watkin Williams, for the respondents. The provisions of the special Act have reference to the rights of the trustees of the Surrey and Sussex roads, a body which has now ceased to exist. Even if that were not so, there is no inconsistency in the two provisions, which might well have been contained in the same Act. The difficulty of working out both remedies, though it might give rise to inconvenience, does not prevent the two provisions standing together.

W. G. Harrison in reply.

Cur. adv. vult.

(1) 33 L. J. (Ch.) 372.

10 June 1873 *4291-5282*

The judgment of the Court (Bovill, C.J., and Keating and Brett, JJ.) was delivered by

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KEATING, J. This was an appeal against an order by a magistrate requiring the appellants to repair within two months a bridge carrying the railway of the appellants over a turnpike-road called the Clapham Road.

The order was made under the 65th section of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), and in conformity with that section. But it was contended on the part of the appellants that, by the provisions of the special Act under which the railway was constructed, that section of the general Act was "expressly varied or excepted," so as to prevent its operation in the present case; and the question submitted to us is, whether it was so varied or excepted,—a question, undoubtedly, of some nicety.

In considering the question how far an enactment in a general statute is varied or excepted by the special Act, Lord Chancellor Westbury laid down the following rule, that, "if the particular Act gives in itself a complete rule on the subject, the expression of that rule would undoubtedly amount to an exception of the subject-matter of the rule out of the general Act:" *Ex parte St. Sepulchre, In re The Westminster Bridge Act.* (1)

Now, applying that rule to the present case, it would seem that the 97th section of the special Act, The London, Chatham, and Dover Railway (Metropolitan Extension) Act, 1860, does give a complete rule on the subject of enforcing the repair of bridges, including the one in question; for, it provides that if, after three days' notice to the company, they do not begin to repair the bridge, and proceed therein with all reasonable expedition to complete the repairs to the satisfaction of the surveyor of the trustees of the road, the trustees may do the work themselves, and recover the cost from the company. As long, therefore, as the trustees of the road exist, it is difficult to say that the repairs of the bridge are not effectually provided for by the 97th section of the special Act, which would, according to the rule referred to, dispense with the

(1) 33 L. J. (Ch.) 372.

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provisions of the 65th section of the Railways Clauses Consolidation Act, 1845. Were it otherwise, the railway company, having repaired to the satisfaction of the surveyor of the trustees, or, the repairs having been actually completed by the trustees themselves, might be called upon by an order of justices to repair according to the requirements of the surveyor of highways, and thus be subjected to the obligation to satisfy two different surveyors, possibly differing as to the nature of the repairs required,—a result which could scarcely have been in the contemplation of the legislature in passing the special Act.

If, therefore, we were to answer the question as put, namely, “whether the provisions of the Railways Clauses Consolidation Act, 1845, s. 65, are expressly varied by those of the special Act,” we should do so in the affirmative. But, inasmuch as the Turnpike Act under which the trustees referred to in the 97th section of the special Act acted has expired, we are clearly of opinion that upon such determination of the turnpike-trust the provisions of the general Act, even if previously suspended, would revive, and that the order made by the magistrate after such revival would be valid.

We therefore dismiss the appeal; but, under the circumstances, without costs.

Appeal dismissed.

Attorney for appellants: *W. Cleather.*

Attorney for respondents: *A. A. Corsellis.*

[IN THE EXCHEQUER CHAMBER.]

1872

Nov. 28.

McCARTHY v. THE METROPOLITAN BOARD OF WORKS.

Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68—Compensation for Lands injuriously affected—Obstruction of Highway.

The plaintiff was the occupier, under a lease for a long term, of premises in the City of London, where he carried on the business of a carman and contractor. Adjacent to these premises, but not actually touching them, a public highway being between, was a public draw-dock communicating with the river Thames. The plaintiff had no right or easement to or in the dock other than his right as one of the public, but the plaintiff's premises, by reason of their proximity to the dock, and the access given thereby to and from the river, were rendered more valuable either to sell or occupy, with reference to the uses to which any owner might put them.

The Metropolitan Board of Works, in constructing the Thames Embankment under the powers conferred upon them by the Thames Embankment Act, 1862 (25 & 26 Vict. c. 93), which incorporates the Lands Clauses Consolidation Act, 1845, filled up the dock, and so cut off the access from the river to the public street adjoining the plaintiff's premises, which thereby became, as premises either to sell or occupy in their then state, and with reference to the uses to which any owner or occupier might put them, permanently diminished in value :—

Held (by Kelly, C.B., Blackburn, J., Archibald, J., and Bramwell, B., Cleasby, B., dissenting, affirming the judgment of the Court below), that the plaintiff's interest in the premises was injuriously affected within the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), s. 68, so as to entitle him to compensation.

Ricket v. Metropolitan Ry. Co. (Law Rep. 2 H. L. 175) and *Chamberlain v. West End of London, &c., Ry. Co.* (2 B. & S. 605, 617; 31 L. J. (Q.B.) 201; 32 L. J. (Q.B.) 173) discussed.

ERROR from the judgment of the Court of Common Pleas on a special case reported, Law Rep. 7 C. P. 508, where the facts are fully stated.

Hawkins, Q.C. (Philbrick with him), for the defendants.

Prentice, Q.C. (Thesiger with him), for the plaintiff.

The arguments were substantially the same as in the Court below, and may be sufficiently gathered from the judgments.

The following cases were referred to in addition to those cited in the Court below and referred to in the judgments:—*London*

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affirmed L. H. 12 26 7 H. L. 263

1872 *and North Western Ry. Co. v. Smith* (1); *Moore v. Great Southern*
 McCARTHY *and Western Ry. Co.* (2); *Tuohey v. Great Southern and Western*
 v. *Ry. Co.* (3).

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Feb. 7.

Feb. 7. The following judgments were delivered:—

CLEASBY, B. The question in this case is, whether the plaintiff is entitled to compensation, under the 68th section of the Lands Clauses Consolidation Act, by reason of his premises being injuriously affected by the Thames Embankment made by the defendants. I understand that all my learned Brothers think the plaintiff is so entitled (I regret that I cannot agree with them), because the plaintiff appears to have suffered in his trade considerable damage from losing the use of the river. But it appears to me that the case is not brought within the words of the Act of Parliament, nor within the construction which they have received in the courts and in the House of Lords. If the plaintiff is entitled, I cannot see how any person occupying premises in a street communicating with the river, who, for the purposes of his occupation, made use of the river—a person, for instance, who had a coal-yard and who had barges brought up there, or a builder having premises contiguous to the new Courts of Law and engaged in some contract there—would not have a similar claim, for he could undoubtedly show that his premises were increased in value by the use of the river. And the multiplicity of claims which this would give rise to is strongly pointed out by Lord Cranworth in *Ricket v. Metropolitan Ry. Co.* (4) as a good reason for not extending the meaning of the words. The present case, as well as that of others using the river, might have been made the subject of special provision for compensation, limiting the right within certain limits and under certain conditions; but under the general Act such cases are not provided for.

The plaintiff was the occupier of certain premises at Whitefriars, of which he had a long lease, and where he carried on an extensive business in bricks and other building materials.

The premises were situated at the distance of about 350 feet

(1) 1 Mac. & G. 216; 19 L. J. (Ch.) 192.
 (2) 10 Ir. C. L. 46.

(3) 10 Ir. C. L. 98.
 (4) Law Rep. 2 H. L. 175.

from the general line of the river Thames, with other premises between them and the river. There was, however, a dock projecting from the river into the land for the distance of 352 feet, as shewn on the plan which forms part of the case, and the extremity of this reached to within about 25 feet of the corner of the plaintiff's premises as appears by the scale at the bottom of the plan. The premises, therefore, do not adjoin the river or adjoin the dock so as to give the plaintiff any of the rights of a riparian proprietor. The case finds (paragraph 4) "the plaintiff had no right or easement to or in the draw-dock other than as one of the public, nor was there appurtenant or otherwise belonging to the plaintiff's premises any easement, right, or privilege in or to the said dock." It appears to me that if the present question was now raised for the first time, the finding referred to would be conclusive against the present claim. For I do not see how premises can be injuriously affected unless there is some damage to the premises themselves, or to some right belonging to them. The premises themselves would be injuriously affected if there was any structural damage by reason of the execution of the works, as if (not to mention other instances) floods were brought upon them which made them unfit for occupation, whether buildings or land: and the premises would be injuriously affected by loss of or damage to some right belonging to them in various ways. As for example if they were waterside premises, and entitled to the flow of a river, and it was taken away as in the *Duke of Buccleuch's Case* (1), or if right to light and air, or private right of way, or any similar right belonging to the premises were interfered with, of which the instances are numerous. Another instance may be mentioned, viz., if the premises adjoined a public highway, and in constructing some works, a bridge for instance, either to carry a railway over a public road or to carry the road over it, the level of the highway was altered—it might be several feet or it might be much less—in such a case the alteration of the level might be a damage to the premises. The public in general might be benefited by having a more level and convenient road, and the person occupying the premises might, as one of the public, share this benefit, but he would have a particular right annexed to his premises of having

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(1) Law Rep. 5 H. L. 418.

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a certain access from them to the highway, and if this was prejudiced (which would be a question of fact) he would have a right to compensation. The general Act of Parliament does not give compensation to all persons whose premises are rendered less valuable for occupation in respect of their calling or trade carried on there in respect of general convenience, but only where the premises themselves are injuriously affected, and injuriously affected by the execution of the works. The premises themselves must be taken or injuriously affected by the execution of the works to give a right to compensation. The words "by the execution of the works," point as it appears to me to the direct effect produced upon the premises by the works, the effect of a contiguous cutting on the fabric, of an embankment upon the light, and so on. This foundation of a particular right interfered with places a limit to claims which would be almost unlimited if every diminution of value was to be sufficient. And as the only reason for the execution of the works by compulsory powers is that they are a great public benefit, any injury which a person suffers in common with the rest of the public may be regarded as compensated for by the benefit. And there is this further objection to reading the words as signifying a mere deterioration of value, that (independently of this being a matter of opinion) the test of the right to compensation would be fluctuating and uncertain, inasmuch as at one time the premises might appear to be diminished in value, at another—six months afterwards—they might appear to be increased, and then the title to compensation would depend upon when the claim was made. But although the reasons already given would have been sufficient, independent of authority, to satisfy me that in the present case the plaintiff was not entitled to compensation; yet, as similar questions have already arisen and been the subject of decision in all the courts and House of Lords, and especially as the opinion which I have expressed is at variance with that of the court below, it is proper to consider the effect of these decisions, and to shew that the conclusion arrived at is in entire conformity with what they established. The words "injuriously affected" in the Lands Clauses Consolidation Act received a construction by the Court of Queen's Bench in the case of *Re Penny*, (1)

(1) 7 E. & B. 660; 26 L. J. (Q.B.) 225.

3/4m R.S. 950

The words of Lord Campbell are: "The test is whether, before the railway Act authorizing the company to do what has been done here, an action would have lain at common law for what has been done and for which compensation has been claimed? If it would, and that act is authorized by the railway Act, compensation may be claimed in respect of it; if the land is not taken, and nothing is done which would have afforded a cause of action before the Act passed, then, although it may produce a deterioration of the property, it does not injuriously affect the land or constitute a ground for compensation." The other judges—Wightman, Erle, and Crompton, JJ.—lay down the same rule in almost the same words. It is taken from the opinion of Lord Cranworth in the House of Lords in the case of *Caledonian Ry. Co. v. Ogilvy* (1), assented to by Lord St. Leonards, which is the real foundation of the rule since adopted by all the Courts in dealing with cases of that description. It is unnecessary to refer to all the authorities; but as Mr. Justice Willes was one of the judges from whose judgment the present case is an appeal, I may quote his words in *Beckett v. Midland Ry. Co.* (2): "To entitle a claimant to compensation under the Lands Clauses Consolidation Act, 1845, two things must concur, viz., that he has sustained a particular damage from the execution by the company of the works authorized by the special Act, and that the damage was one for which he might have maintained an action if the work was not authorized by Parliament." The rule was adhered to and acted on by the House of Lords in *Ricket v. Metropolitan Ry. Co.* (3) It is true, that in that case Lord Westbury states his opinion to the contrary, and would extend the meaning of the words "injuriously affected" by making them include any damage sustained by the occupier in connection with his occupation; but if that opinion had been adopted, the decision of the House of Lords must have been different, and therefore it must be considered as rejected by the highest tribunal, and by that we are bound. This test is really the same as that which has been put already in different words, viz., that where there is no injury to the premises themselves, nor

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(1) 2 Macq. 229.

(2) Law Rep. 3 C. P. at p. 94.

(3) Law Rep. 2 H. L. 175.

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to any rights connected with them, there is no claim to compensation, as there can only be an action where there is an injury to a right. In the present case, according to the statement in par. 4, there is no injury to the premises, nor to any right belonging to them, nor any damage of a different nature from that which would be sustained by any of the public using the dock regularly or occasionally; and when that is the case, the redress for the obstruction to a navigable river or highway is by indictment, and not by action: *Reg. v. Bristol Dock Co.* (1); *Winterbottom v. Lord Derby.* (2) It is true, a person injured may remove the obstruction so far as is necessary to enjoy his rights: *Mayor of Colchester v. Brooke* (3); but he would do this, not as owner or occupier of particular premises, because he does not enjoy the right in that character, but as one of the public.

The plaintiff besides his right as one of the public to pass along the street in front of his premises, has also the right belonging to his premises to pass from them to that street not altered or interfered with except so far as the commissioners of sewers may have rights over it, with which we have nothing to do. And if the level of the street had been altered by the works of the defendants, or its inclination changed for the worse, or its use as a highway taken away by its being stopped, it might be said that the particular right of the plaintiff had been infringed, so as to give him a claim for compensation.

It appears to me that the judgment of the House of Lords in *Ricket v. The Metropolitan Ry. Co.* (4) gives authority to the ground upon which Lord Cranworth puts his judgment. The question in that case was the right to compensation in respect of the obstruction of a public street communicating with a public footway, by the side of which the plaintiff's premises were situated. The case was therefore like the present one; the obstruction here is of a public river communicating with the street adjoining the plaintiff's premises; there it was of a public street. There is, no doubt, the distinction that in that case the obstruction was not permanent; in the present it is; but this it is submitted can make no difference in the construction to be given to the words

(1) 12 East, 429.

(2) Law Rep. 2 Ex. 316.

(3) 7 Q. B. 379: 15 L. J. (Q.B.) 173.

(4) Law Rep. 2 H. L. 175.

“injuriously affected.” Lord Cranworth says, in that case (1): “Both principle and authority seem to me to shew that no case comes within the purview of the statute unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundations of buildings on it, obstructing its lights or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the legislature.” And he adds, after a few sentences: “The loss occasioned by the obstruction now under consideration may be greater to the plaintiff than to others, but it affects more or less all the neighbourhood. He has no ground of complaint differing save in degree from that which might be made by all the inhabitants of houses in the town where the works for forming the railway were carried on.” Lord Chelmsford’s judgment is principally occupied with an elaborate discussion of all the authorities, but before examining them he bases his judgment upon the rule that the act complained of must have been the subject of an action unless legalised by Parliament. His lordship, in considering whether an action would be maintainable, first adverts, in general, to the case of personal injury or injuries of that nature arising upon the obstruction of a highway. In such cases, though no doubt an action would lie, there could clearly be no compensation, and then the subject is not further noticed. He then refers to the cases in which an action is said to be maintainable in respect of damages connected with the occupation of the premises, and after examining the adverse authorities, and referring to *Rex v. London Dock Company* (2), and the judgment of Erle, C.J., in the Exchequer Chamber in the case before them, he holds that such damages are too remote to be the subject of an action for a public nuisance, and, therefore, not the subject of compensation. Now the words “too remote” are used in connection with the judgment in *Rex v. London Dock Company* (2), as being the effect of the judgment there. Those particular words

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(1) Law Rep. 2 H. L. at p. 193.

(2) 5 A. & E. 163.

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“too remote” were not used, but the judgment was that the words “injury to an estate or interest in land” would be satisfied by such consequences as the following, “as if by their cut, or bridge, or any other work, they had weakened the foundations, damaged the lights, stopped the drains, or done any similar injury to the houses, lands, &c.” It is not, therefore, too much to say that by the words “too remote” his lordship meant too remote from or not connected with injury to the premises themselves, and this would make the opinion of Lord Chelmsford in effect and substantially the same as that of Lord Cranworth already given. His lordship then goes into a full examination of all the authorities, so that the House may give an authoritative final decision upon the whole case. Lord Chelmsford’s judgment was delivered before that of Lord Cranworth, but I do not think it can be doubted, after reading it through, that if it had followed that of Lord Cranworth, he would have assented to Lord Cranworth’s language above quoted, and the case was accordingly held to be one in which compensation could not be given, and the judgment of the Exchequer Chamber to that effect was affirmed. If the view taken of Lord Chelmsford’s judgment be correct, it would not, I apprehend, be disputed that the decision of the Court below is at variance with the ground of decision of the House of Lords and cannot be supported.

This case was decided in the year 1867, but there was an earlier case in the House of Lords decided in the year 1857, in which a similar question arose, viz., *Caledonian Railway Company v. Ogilvy* (1). In that case, as I understand the facts from the judgment, a public road which was the principal access to a residence was obstructed by a railway crossing it on a level within a few yards of the lodge. Without the Act of Parliament this would have been a nuisance, and the subject of an action at the suit of any person who could shew a particular damage of a different nature from that suffered by the public generally.

The jury assessed the damages for the level crossing and severance at 560*l.*, and it was held by the House of Lords that the level crossing gave no claim for compensation, reversing the judgment of the Scotch Court. In that case the obstruction was of a

(1) 2 Macq. 229.

highway, in the present case it is of a public river, which is also a highway, and this is the main distinction between the two cases, with the addition that in the present case the obstruction is complete; in the other it was partial, an addition unimportant in principle if the obstruction was injurious. The case was decided by Lord Cranworth and Lord St. Leonards. Lord Cranworth thought the case clear both upon principle and authority upon the ground that though the plaintiff suffered by the obstruction more than any other person, yet he did not suffer differently, and therefore could not have maintained an action. He says at page 236, "But it would only be a more frequent repetition of the same damage; it would not be any damage different from that which might be sustained by any other subjects of her Majesty; for all attempt at arguing that this is a damage to the estate is a mere play upon words." Lord St. Leonards decides the case substantially upon the same ground. But there are passages in his judgment which deserve particular notice. He points out the distinction between the case itself and those cases in which the highway which the premises adjoin is itself interfered with, a distinction of importance in dealing with the two cases on which the plaintiff mainly relied, viz., *Beckett v. Midland Ry. Co.* (1), and *Chamberlain v. West End of London, &c., Ry. Co.* (2) At page 248 Lord St. Leonards says, in reference to the case of *Reg. v. Eastern Counties Ry. Co.* (3), "In that case there was an actual injury I should say to the land; at all events there was an injury to the owner of the land, which would give him an immediate right, no doubt, to compensation. From his land he had been enabled to step at once upon the road which had been lowered by the company, and so lowered that he lost his access to that road unless he had new appliances in order to enable him to approach it. There was, therefore, a real injury, there was a ground of complaint there personal to himself, and which was not open to the rest of the world. It was a general complaint when he got to the road; when he got there he had to sustain an injury in common with all the rest of the Queen's subjects; that is to say, the road might be rendered a great deal less

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(1) Law Rep. 3 C. P. 82.

(2) 2 B. & S. 605, 617; 31 L. J. (Q.B.) 201; 32 L. J. (Q.B.) 173.

(3) 2 Q. B. 347.

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easy to travel upon than it was before it had been crossed. For that he would have no remedy, it is a common inconvenience ; all are subject to it ; and the power to commit that injury was given by Act of Parliament for the public benefit, and therefore the benefit which is received by the public from the railway is considered to be the only compensation to which the Queen's subjects in general are entitled in respect of the damage caused at the particular spot over which the railway travelled, or in respect of which the road in that spot had been lowered."

He afterwards, at page 251, refers to the case of *Reg. v. Bristol Dock Company*. (1) In that case the person complaining was a brewer, who had carried on his trade by means of water drawn from a navigable river by means of pipes. The defendants, in the execution of public works, had fouled the river, and made the water unfit for brewing, and they were bound to make compensation to persons whose premises were damaged or made useless, or to purchase them, at the option of the owner. The brewer endeavoured to supply the defect by procuring other water, but was unable to do so, and abandoned the premises. It was held not to be a case within the Act, because the right to pure water was not a particular right belonging to the owner in respect of his premises, but a general right enjoyed by all the public ; Lord St. Leonards is unable to distinguish that case in principle from *Ogilvy's Case* (2), and it appears to me, I must say, almost impossible to distinguish it from the present case. His Lordship says, at p. 251, "It was held that he had only a general right ; that nobody had any particular personal right to the water ; that it was common to all the King's subjects ; that therefore he was not entitled to recover upon that ground alone. Now where is the difference between a public river and a public road ? The rights of both are common. A public river is, in point of fact, a highway ; and a public road is a highway. You use each according to its quality, and if you have only that common right which belongs to all men, you cannot claim compensation in regard to a damage to either the one or the other which is authorized by Act of Parliament ; and if in any such case Parliament ever did intend that compensation should be given, it is perfectly manifest that it would be given generally to all

(1) 12 East, 429.

(2) 2 Macq. 229.

within a certain limit, because there must inevitably be damage to many to a certain extent."

The present case is one of the stopping up of the flow of a river at a particular spot in which the plaintiff has no different right from that of any other of Her Majesty's subjects; and the authorities given, I feel bound to say, appear to me to establish that the claim to compensation in such a case cannot be maintained; to allow it would be to break in upon a rule established by the highest authority upon full consideration, and which prevents the mischief referred to by Lord Cranworth and Lord St. Leonards. It would also introduce very great uncertainty as to the extent of liability to which all bodies executing great public works would be exposed, because their liability would depend not upon any facts capable of being ascertained, but upon the speculative opinion of surveyors and other witnesses upon the deteriorating effect of the works upon premises situated at a greater or less distance; as to which a case of deterioration by the loss of the contingent advantages of an available navigation might readily be believed in and easily established. The matter is of such general importance, involving a principle applicable to so many cases, that I have felt bound to give effect as far as I could to my own opinion, though differing from so many of my learned brothers. But although the authorities in the House of Lords referred to would be considered binding even if they varied from decisions of other courts, I ought not to pass by without noting the two cases upon which the plaintiff particularly relied. *Beckett v. Midland Ry. Co.* (1) was one of those cases.

In that case the plaintiff's premises adjoined a public highway, and the works of the defendants had narrowed the highway from fifty feet to thirty-five feet, and there was evidence that the consequence was that carriages could not turn opposite the house as before, and that omnibuses, instead of stopping to allow himself and other passengers to alight opposite his house, stopped where they could turn. The evidence was no doubt slight, but still there was evidence for the jury that the plaintiff had not the same beneficial access to the highway in front of his house which he had before. This was properly considered a particular injury and

(1) Law Rep. 3 C. P. 82.

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restriction of the right of the individual in the enjoyment of the house so as to give a claim for compensation. And the Chief Justice, in his judgment, puts the decision on that precise ground. The case is brought within the observations of Lord St. Leonards in connection with the case of *Reg. v. Eastern Counties Ry. Co.* (1), which I quoted at length from their bearing upon *Ricket's Case*. (2) The same remark applies to the case of *Chamberlain v. West End of London, &c., Ry. Co.* (3), which being a judgment in the Exchequer Chamber, was mainly relied upon as binding on this Court. For although the facts are not so clear as could be desired, sufficient appears to shew that the works of the defendants had deprived the plaintiff's house of the right of being roadside premises adjoining a public highway as much as if the site of his house had been changed. The case is so much relied on that I must be permitted to quote what Erle, C.J., says of it in delivering the judgment of the majority of the Court in the Exchequer Chamber in *Ricket v. Metropolitan Ry. Co.* (4) The passage cited, and indeed the whole judgment, has a close bearing on the present case. "The principle is, that the value of a house is affected by the relation of its situation to the adjoining highway, that is, by the convenience of the private rights of ingress and egress from the one to the other, and by the circumstances of the highway itself tending to make it useful and agreeable to the occupier of the house. If a house on a level with a commodious, beautiful, well-frequented street, either be lifted or sunk by the railway twenty feet above or below the level of that street, the house would be injuriously affected both for pleasure or profit by means of the change in the access to and from the house, or if a house, fronting to a street of that description, should be turned round so as to front to a dark back alley, the house would be injuriously affected. The site of the house would be altered for the worse. In these cases suggested the house is supposed to be removed to make the meaning more clear, but if instead of lifting or sinking the house, or turning its front from a grand street to a bad alley, the street is lifted, or sunk, or changed

(1) 2 Q. B. 347.

(2) Law Rep. 2 H. L. 175.

(3) 2 B. & S. 605, 617; 31 L. J.

(Q.B.) 201; 32 L. J. (Q.B.) 173.

(4) 5 B. & S. 165.

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in its character, the relation of the house to its highway is affected precisely in the same degree as it would be by altering the relative position of the house itself in respect of this highway." Such is the principle of *Chamberlain v. West End of London, &c., Ry. Co.* (1) "The frontage had been to a wide well-frequented road leading direct to and from important towns; by the execution of the railway works it was made to front to a dumb alley much below the level of the substituted thoroughfare over a railway bridge along which the stream of passengers would be compelled to flow. Frontage gives the value to building ground; therefore the railway company took away valuable frontage and substituted that which was very inferior, and therefore it was held that they had injuriously affected the house both in its frontage and in its access to and from the effective thoroughfare of the locality." After reading the manner in which this Court dealt with the case referred to, can it be regarded as an authority that every house in all the streets leading down to the Thames and in the streets connected with them would confer a right to compensation if it could be shewn that it was deteriorated in value by being deprived of the public use of the river? I do not think it necessary to consider the cases cited in which persons who have sustained particular injury by reason of the obstruction of a public highway or by any other public nuisance have maintained their action for damages. Because that is not of itself a test, as is pointed out by Lord Cranworth in *Caledonian Ry. Co. v. Ogilvy* (2), and again very distinctly by Lord Chelmsford in *Ricket's Case* (3), and by one of the judges in this case in the Court below. Although there is no right to compensation unless an action would have been maintainable, it does not follow because an action would be maintainable for damages sustained, therefore there is in all cases a right to compensation. If a man sustained such injury as a broken limb or a damaged horse he could maintain an action founded upon the unlawful obstruction of the highway; but that would not make it an injurious affecting of his premises, however near the obstruction. The claim is brought into existence by something voluntarily done afterwards, and although the damage may in some measure be connected as

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(1) 2 B. & S. 605, 617; 31 L. J. (Q.B.) 20; 32 L. J. (Q.B.) 173.

(2) 2 Macq. 229.

(3) Law Rep. 2 H. L. 175.

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to its extent and frequency with the proximity of the premises, that is too remote a connexion to constitute an injurious affecting. As this judgment is founded upon decisions in the House of Lords in which those cases are examined, it would be superfluous to justify the decisions by a further examination of them. In many of the cases it would appear not to have been sufficiently borne in mind that if premises are injuriously affected, so as to give a right to compensation, the remainderman and reversioner would have the same right to compensation as the person in possession, that is of course if the injury was of a permanent character.

BLACKBURN, J. I will now deliver the judgment of my Brother Archibald and myself, in which my Brother Channell, before he ceased to be a member of the Court, concurred. In this case the plaintiff is owner of real property which is much deteriorated in value in consequence of the works of the defendants having shut up a draw-dock which was a public waterway coming near to the plaintiff's property, but not actually touching it, the public highway being between. The plaintiff had no private right of way; but, in consequence of the proximity of the public dock, his premises were worth more either to sell or occupy. The jury assessed the amount of damage at 1900*l*. The question is, whether the plaintiff is entitled to receive compensation for this deterioration in value of his property? In *Chamberlain v. West End of London, &c., Ry. Co.* (1) the Court of Exchequer Chamber decided that the plaintiff in that case was entitled to compensation for the depreciation of the value of his houses, the arbitrator having found that the stoppage of an old highway seventy yards from the plaintiff's houses had diminished the number of passengers, and so rendered the plaintiff's houses less suitable to be let as shops, and so diminished their value. There was no actual touching of the premises in that case more than in this; and if there is any difference in respect of the directness of the damage, it is more direct in the present case. If this decision still remains not overruled by the House of Lords it is binding on us, and the plaintiff in the present case is entitled to our judgment. But after that case, *Ricket v. Metropolitan Ry. Co.* (2) was decided in the House of Lords, and

(1) 2 P. & S. 617; 32 L. J. (Q.B.) 173.

(2) Law Rep. 2 H. L. 175.

the House of Lords, by a majority of two peers to one, decided that the plaintiff in that case was not entitled to compensation. The decision of the House of Lords, the final court of appeal, is binding, not only on all inferior tribunals, but even on the House itself, and fixes the law until the legislature thinks fit to intervene. We have, therefore, only one duty to perform, and that is, to discover whether the ratio decidendi of the House in *Ricket v. Metropolitan Ry. Co.* (1) does or does not contain in it a reversal of the decision of the Exchequer Chamber in *Chamberlain v. West End of London, &c., Ry. Co.* (2) The majority of the judges in the Exchequer Chamber in *Ricket v. Metropolitan Ry. Co.* (3) thought the two cases might stand together, for they reversed the decision of the Queen's Bench, though the decision in *Chamberlain v. West End of London, &c., Ry. Co.* (2) was clearly binding upon them. The distinction which Erle, C.J., made between them in delivering their judgment is to be found at pp. 164, 165, in the report in 5 B. & S.; and, if I understand it rightly, is that a diminution in the rent which Chamberlain received when letting his houses in consequence of the diminished facility of access deterring passengers from coming that way, and so diminishing the profits which the occupiers of the shops would make, was an injury to the houses; but that a diminution in the profit which Ricket received from his own occupation of his house as a public house from a precisely similar cause was only a personal injury. I cannot, speaking for myself only, at all agree in this distinction. I think it necessarily follows, from the facts found in *Ricket v. Metropolitan Ry. Co.* (1), that the plaintiff's house would have let for a smaller rent during the twenty months that the obstruction continued; but such a distinction was certainly made. Whether the diminished value of a house to let or sell does or does not in itself constitute an injurious affecting of the land is another question. Lord Cranworth, in his judgment in *Ricket v. Metropolitan Ry. Co.* (1), clearly was of opinion it did not. He says, p. 198, "Both principle and authority seem to me to shew that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining

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(1) Law Rep. 2 H. L. 175.

(2) 2 B. & S. 605, 617; 31 L. J. (Q.B.) 201; 32 L. J. (Q.B.) 173.

(3) 5 B. & S. 156.

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party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundations of the buildings on it, obstructing its light or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the legislature." If this is the principle of the decision of the House of Lords, *Chamberlain v. West End of London, &c., Ry. Co.* (1) is clearly overruled, for in that case the works of the defendant did not come within seventy yards of the plaintiff's property.

In *Reg. v. Metropolitan Board of Works* (2) the Court of Queen's Bench thought that this was the ratio decidendi of the Lords; and, therefore, in a case identical in principle with the present, gave judgment for the defendants. But in *Beckett v. Midland Ry. Co.* (3) the Court of Common Pleas took a different view of what was the ratio decidendi in *Ricket v. Metropolitan Ry. Co.* (4). They seem to have considered it as proceeding partly on the remoteness of the damage, and partly on the same distinction which was put in the judgment of Erle, C.J., to which I have already alluded, and therefore as not overruling *Chamberlain v. West End of London, &c., Ry. Co.* (1). And in substance the Court of Common Pleas have followed that decision in the present case. Lord Westbury was clearly desirous, not only to support the decision in *Chamberlain v. West End of London, &c., Ry. Co.* (1), but to carry it a great deal further; whilst Lord Cranworth, as it seems to us from the passage already cited, clearly decided on a principle inconsistent with the decision in that case: we must look to the opinion of the Lord Chancellor to see whether the House of Lords did overrule the decision or not. The Lord Chancellor did certainly proceed in part on the ground of the remoteness of damages, but he did not confine himself to it, but proceeds, at p. 188, to state his views on the whole case. It is unfortunate that two courts should have differed as to what these were. But we find, at p. 191, that the Lord Chancellor does expressly mention *Chamberlain v. West End of London, &c.,*

(1) 2 B. & S. 605, 617; 31 L. J.
(Q.B.) 201; 32 J. J. (Q.B.) 173.

(2) Law Rep. 4 Q. B. 358.

(3) Law Rep. 3 C. P. 82.

(4) Law Rep. 2 H. L. 175.

Ry. Co. (1), and treats it as a right decision, apparently adopting the distinction made between this case and the case then at the bar by Erle, C.J., in the judgment delivered by him in the Exchequer Chamber. We think it not now the question whether that distinction was satisfactory or not, but whether the decision in *Chamberlain's Case* is overruled by the House of Lords, or still a subsisting authority. We think, upon the whole, it is better to treat it as not yet overruled, leaving it to the House of Lords, if we have misapprehended the effect of their decision, to correct it. We, therefore, affirm the judgment below.

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BRAMWELL, B. In this case the plaintiff, by the execution of the works of the defendants, has sustained a damage in respect of his interest in certain premises, the value thereof being lessened by the execution of these works; which loss could not have been inflicted on him except under the powers given to the defendants by their Act. In short, "he has sustained damage by reason of the exercise as regards such lands of the powers of the Act" 8 & 9 Vict. c. 20, s. 6. In reason and justice he ought to be compensated. The only matter urged to the contrary, viz., that the public benefit justifies this uncompensated injury, is idle. If the public benefit will not authorize the taking of the smallest piece of land or the doing of the smallest injury to the structure of a building or its easements without compensation, neither can it in reason or justice authorize this loss without compensation. Unless it will pay to do the work, including in its cost compensation for losses, the work should not be done. There is no difficulty in ascertaining the compensation any more than in a case of a partial loss of light. No doubt vague claims may be made, and unfounded ones, but justice must be done to A. though at the risk of a fraudulent claim by B. Indeed, if the plaintiff's premises had been taken this source of value would have had to be taken into account and estimated, and this is also a strong argument for the plaintiff. For if the defendants, by taking the premises, would have to pay the whole value, why are they to do this damage gratis, or could they have first stopped the draw-dock and then taken the house at the diminished value? The loss, it is

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to be borne in mind, is by execution of powers given; because there may be a loss by new works to which this reasoning does not apply, as the diversion of traffic from an old by the making of a new road. But then the damage is not "caused by the exercise of the powers of the Act." Take a plain case, indeed the one I have supposed; a new road is made, traffic is diverted from an old one. The owners of the soil could, without statutory powers, have dedicated the new road to the public; or the owners of the soil could make a railway if they pleased and diminish the value of the houses in the town through which the old coach road ran, as at Maidenhead. They could not, indeed, in most cases, make the railway without statutory powers, because they would not take land by compulsion, cross and divert roads, and other things; but the railway injures property, not directly by exercise of any of their powers given by the Act, but as an indirect consequence of the exercise of such powers, and of the dealing with land they have purchased as any owner might have dealt with it if he pleased. And, indeed, railways have been made without statutory powers, as that from Gravesend to Stroud, and the Festiniog Railway. But for the powers of the Act the loss by the diversion of traffic would not have occurred, but the exercise of those powers does not cause it. Those powers are certainly not *causa causans*, and hardly a *causa sine quâ non*. For the statute means exercise of the powers in relation to the land affected. And, indeed, the loss in such cases is caused not by the making of the railway but by its subsequent user. I say, therefore, that in this case there is a direct loss caused to the plaintiff by the exercise of powers conferred by the Act of Parliament, and that there is no reason why the plaintiff should not be compensated. And it seems to me legitimate to say, that the legislature ought not to have intended this, and legitimate and respectful to say that what it ought not to have intended presumably it did not intend, and that what it did not intend it has not enacted. I approach the consideration of the statute therefore with the belief that the true construction is in the plaintiff's favour. Now I agree that the word "injuriously" does not mean "wrongfully" affected. What is done is rightful under the powers of the Act. It means hurtfully or "damnously" affected. As when we say of a man

that he fell and injured his leg. We do not mean that his leg was wronged, but that it was hurt. We mean he fell, and his leg was injuriously, that is to say, hurtfully affected. At the same time, I am clearly of opinion that to entitle the parties interested to compensation, the injury or hurt must be such as could not lawfully be inflicted except by the powers of the Act. I have above given my reasons for this. But I will shortly add that the words of the section shew this. The lands must be "injuriously affected by reason of the *exercise* as regards such lands of the *powers of the Act*." The act therefore injuriously affecting must be one which would be wrongful but for the statute. But I agree that it need not be one for which an action would lie. It is enough that it would be indictable or might be prevented by injunction. Now clearly this stoppage of the draw-dock would have been indictable and the defendants might have been compelled to abate the nuisance; besides, it is not to be presumed any one would break the law. Further, I believe that they might have been prevented by injunction from doing, and compelled to undo if they did, the act which has caused the loss. If so, then, we have a thing done under the powers of the statute which could not have been lawfully done but for those powers, which if done might have been compelled to be undone, which directly causes a loss to the plaintiff in respect of his interest in these premises. Why is this not within the section? It says, "shall make to the owners, &c., of land injuriously affected by the construction of the works full compensation for all damages sustained by such owners, &c., by reason of the exercise, as regards such lands, of the powers of the Act." I admit of course that the loss must be to the person in respect of his interest in the thing. That the thing, the premises, must be lessened in value, not merely that the person suffers in common with the rest of the public, or on account of something peculiar to him personally. I admit, for instance, that if a market gardener had usually landed his goods there and taken them to Farringdon Market he would have no claim, because no premises of his would be injuriously affected. It might be an inconvenience and even loss to him to get his goods to market in some other way. But his premises would not be injuriously affected. He would suffer as one of the public—

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more, perhaps, than any one else—but still as one of the public only; and it may well be, that though his loss is special, yet he must bear it as one of the public for the public gain, and on account of the difficulty of compensating in such cases. He would be injuriously affected, but not his premises. His case would be like that of a medical man injured by sanitary improvements under statutory powers, which, by diminishing sickness, diminished his practice. Nor is such an affecting one by the exercise of the powers of the Act. No power of the Act is directly applied to cause it; it is an indirect consequence only. Here the premises are injuriously affected, and for actual and potential purposes they are of less value. If it is to be asked where the line is to be drawn, I answer, not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing-place ten miles off if there was no other within twenty of the premises affected. The line is to be drawn by ascertaining whether the premises are actually or potentially affected for present or other purposes, or the man—whether it is only the person who happens to be using them. It is said this might give the right to make an immense number of claims. Suppose it did. Suppose there were a thousand claims for 1000*l.* each. If they are well founded 1,000,000*l.* of property is destroyed, and why is not that part of the cost of the improvement; and if taken into account as such, why should not the loser of it receive it? On these principles I think the present case within the statute and give my entire concurrence in Lord Westbury's reasoning, from which the foregoing is borrowed. Of course, if there is any binding authority on the subject, reasoning is useless. But I think the cases are in such a condition that there is none on which we can act, and that the matter must be set right by the House of Lords or by legislation. That being so, we may reasonably inquire how this case ought to be decided. *Ricket v. Metropolitan Ry. Co.* (1) would govern us did we know the ratio decidendi. Now, there is a ratio decidendi expressed by Lord Cranworth which would entitle the defendants to judgment. He appears to think that there must be some damage to structure or easement to constitute injurious affecting. Now, it does seem

strange that, the act and its results being the same, the premises are injuriously affected or not according as the right hurt or injured is public or private as by grant or prescription. But, further, Lord Cranworth says, "or making it inaccessible by lowering or raising the ground" immediately in front of it." I suppose the important word there is "immediately," making the thing peculiar to the house. But what in principle is the difference between "immediately" and five yards distant; what is the difference in principle between total inaccessibility and total loss and partial inaccessibility and partial loss? With great respect to his Lordship's opinion and that of my Brother Cleasby, they seem to give up their position in this. For lowering the ground in front would be no cause for compensation unless it was a highway; and if it is a highway the claimant has no right in relation to it except as one of the public. His premises being close to the road does not alter his case in principle, but in degree only. But Lord Cranworth's was not the ratio decidendi of Lord Chelmsford. Further, I agree in the remark of my Brother Blackburn, that the judges and (for aught we can see) the Lords in *Ricket v. Metropolitan Ry. Co.* (1) did not mean to overrule *Chamberlain v. West of London, &c., Ry. Co.* (2); and I agree with him in thinking that if that is law, it is an authority for the plaintiff, and that the distinction between the two cases is unreal. Then, in order to reverse the judgment we ought to be able to say that it is wrong on principle or authority. I cannot say it is on either.

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KELLY, C.B. It is necessary, in the first place, to have a clear apprehension of the facts of the case. The plaintiff is the owner of a house and premises, in which he carried on the business of a carman, and the defendants, in order to construct an embankment, possessed themselves, under the powers of their Acts of Parliament, of a water-way or public highway called a draw-dock, leading from a portion of a highway, lying between the plaintiff's premises and the draw-dock, to the river Thames. The plaintiff, therefore, had a public way from his house and premises, across a space of twenty-one feet to the draw-dock, and thence, by the draw-dock of the

(1) Law Rep. 2 H. L. 175.

(2) 2 B. & S. 605, 617; 31 L. J. (Q.B.) 201; 32 L. J. (Q.B.) 173.

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length of 352 feet to its outlet on the Thames; and the defendants, by taking the draw-dock and constructing an embankment upon its site, have permanently destroyed and extinguished the public highway from a spot twenty-one feet from the plaintiff's premises to the river Thames. By this means the communication between the plaintiff's premises and the Thames has been taken away, and his premises have become less valuable, either to sell or to occupy, to the amount of 1900*l*. The question is whether the plaintiff is entitled to compensation under the Lands Clauses Act, 1845, which is incorporated with the defendants' Act of Parliament. A great many decisions, some of them seeming to conflict with each other, are to be found on this question, and it may be well to consider at the outset in what state of things claimants or plaintiffs, whose property, as alleged, has been prejudicially affected within the Lands Clauses Consolidation Act, have been held not entitled to compensation. And, first, it has been determined that loss of profits of trade is not within the Act. Why this should be so; why a man should be deprived of the profits which he is acquiring in his trade, by means of a public highway in the immediate neighbourhood of his premises being taken by a joint-stock company, or other public body, and applied to their own use, and in many cases used for their own profit, and the injured trader should be entitled to no compensation, I have never yet been able to discover; but such is the law, as laid down by the House of Lords, and this Court is bound by their decision. So it has been decided that no compensation can be recovered where no action could be maintained if the wrong had been done not under the authority of an Act of Parliament; and further that it does not follow that even if an action might be maintained a claimant could necessarily obtain compensation within the Lands Clauses Acts. Finally, it has been held that the temporary obstruction, as in *Ricket's Case*, or the occasional obstruction, as in *Ogilvy's Case*, of a public highway, is not the subject of compensation, and that the permanent extinction of a highway, but so distant from the premises of the claimant that he only sustains an injury in common with the public at large, is also not an injury within the meaning of the Act. And Lord Cranworth has laid it down, to entitle a claimant to compensation "there must be a direct injury to the land itself, as by loosening the foundations of buildings upon it, obstructing its light or its

drains; making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration.” On the other hand, it has never yet been determined that the permanent extinction of a public highway so near to the claimant’s premises as directly to diminish their value to sell or to let, or to be enjoyed by the claimant himself, is not the subject of compensation within the Act, and it will be found, upon a careful consideration of the authorities bearing upon this question, that such an injury has been held to entitle the party injured to compensation, and the decision to that effect affirmed by a court of error and approved in the House of Lords. In *Chamberlain v. West End of London, &c., Ry. Co.* (1), it was decided in the Queen’s Bench, and afterwards in the Exchequer Chamber, that the destruction or extinction of a highway at a distance of seventy yards from the nearest of the plaintiff’s houses alleged to have been injuriously affected, was an injury within the Lands Clauses Act, 1845, which entitled the plaintiff to compensation. In that case, the highway at the point of extinction was not only not in contact with the plaintiff’s premises, but, as observed, at a distance of seventy yards; nor were the premises directly injured in any of the modes pointed out by Lord Cranworth in *Ricket’s Case*, or otherwise than that, by reason of the proximity to the plaintiff’s premises of that portion of the highway which had been taken for the purposes of the railway, the access to them by a substituted road was less convenient, and the premises had thereby become less adapted to the carrying on of a trade, and of less pecuniary value. All these requisites concur in the case now before the Court, and it remains to be considered whether *Chamberlain’s Case* must be taken to have been overruled by *Ricket v. Metropolitan Ry. Co.* (2) in the House of Lords. Having carefully considered the facts and the language of the opinions delivered in this case of *Ricket’s* it appears to me that it in no wise conflicts with the decision in *Chamberlain’s Case*, and that it clearly and plainly is distinguishable from the case now before this Court. First, the broad and substantial ground of the decision in *Chamberlain’s Case* and in this case is, that the portion of a high-

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(1) 2 B. & S. 605, 617; 31 L. J. (Q.B.) 201; 32 L. J. (Q.B.) 173.

(2) Law Rep. 2 H. L. 175.

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way the taking of which by the defendants was complained of had been permanently and absolutely extinguished, and the plaintiffs in both cases had been for ever deprived of the use of it for themselves and all others resorting to their premises; whereas in *Ricket's Case*, the highway was not taken at all, and the access to it had been for a time only, and partially, obstructed, another temporary way to the plaintiff's premises had been substituted, and the highway itself ultimately restored to its former condition. It is true that the obstruction was continued for the long period of twenty months, and it may be that as in *Wilkes v. Hungerford Market Co.* (1) an action might have been maintainable for the continuance of the obstruction for an unreasonable time. But there is a marked and manifest distinction between a mere temporary obstruction, which must occasionally take place in a highway under a great variety of circumstances, as during the repairs of the way, or of the sewers, or of the gas-pipes, or water-pipes underneath it, and the permanent destruction of a way by which property in its neighbourhood may be permanently and irreparably injured. But, further, the only damage found by the jury, or complained of by the plaintiff, was a loss of profit in his trade estimated by the jury at 100*l.*, a loss, which as already observed, the House of Lords had decided not to be within the Act of Parliament.

Here, on the other hand, as in *Chamberlain's Case*, it is expressly found that the premises of the plaintiff, with reference to the use to which they might have been applied by any owner or occupier, have been permanently damaged or diminished in value. The decision, therefore, in *Ricket's Case*, upon the facts there found, is clearly distinguishable from *Chamberlain's Case* and this case, and is in express terms distinguished from *Chamberlain's Case* by Lord Chelmsford, one of the majority by whom that decision was pronounced. We are, however, bound not merely to consider the judgment itself of the House of Lords, but to collect, as far as we are able to do so, the *rationes decidendi* from the language in which it was delivered. And it certainly appears from some expressions that fell from Lord Cranworth to have been his opinion that to constitute an injury within the Act it must have been

(1) 2 Bing. N. C. 281.

caused by something in contact with or directly and physically operating upon the land itself. But if such was really the meaning of his Lordship, it is not only opposed to some of the authorities recognised by the decision to which he was a party, but inaccurately illustrates the proposition intended to be laid down. For "the raising or lowering of a highway in front of a claimant's premises" had not the effect in the case referred to of rendering the premises inaccessible, though it diminished the facility of access; and the destruction of a portion of a highway by the construction of an embankment upon it at the distance of some fifteen feet from the claimant's house, is no more "an actual injury to the land itself" than the construction of a railway at the distance of seventy yards, or an embankment at the distance of twenty-one feet. Passing by, then, these remarks of Lord Cranworth, which would confine all claims to compensation within narrower limits than either the authorities or the provisions of the Act of Parliament have prescribed, and without calling in aid the able and elaborate opinion of Lord Westbury in support of the claim to compensation, I think we are warranted in holding that the true *rationes decidendi* in this case of *Ricket's* were, that the pecuniary injury complained of was confined to the loss of profit in trade, that there was no finding of any diminution in the value of the property, and that the highway in question had not been permanently extinguished or taken away, but only temporarily obstructed; all which reasons for the decision are inapplicable to either *Chamberlain's Case* or the case before us. *Caledonian Ry. Co. v. Ogilvy* (1) is equally distinguishable from the present case. There the plaintiff complained, not of the permanent extinction of a highway, but only of an occasional and temporary obstruction by the shutting of the gates on either side of a railway for a few minutes or seconds at a time during the passing or expected passing of a railway train. There is therefore no decision to be found in any court of appeal that where a highway is not merely obstructed but permanently destroyed, so near to premises alleged to be injuriously affected as to render them of less pecuniary value by preventing an easy and convenient access to them by the occupiers and the public, the owner of the premises is not entitled to com-

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(1) 2 Macq. 229.

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pensation. Upon these grounds, therefore, supported by the many authorities referred to, consistent with the decisions of the House of Lords, and in accordance with the strict principles of justice, I am of opinion that the judgment of the Court of Common Pleas should be affirmed.

Judgment affirmed.

Attorney for plaintiff: *John Edmunds.*

Attorney for defendants: *W. W. Smith.*

Feb. 8.

LISHMAN AND ANOTHER v. THE NORTHERN MARITIME INSURANCE COMPANY.

Insurance on Freight—Warranty as to the Amount of Insurance on the Hull—Non-communication of a material Fact coming to the Knowledge of the Assured after the Acceptance of the Risk.

8QB474 A proposal for insurance on freight was made and accepted on the 11th of March. On the 16th the ship was lost. On the 17th the assured, with knowledge of the loss, but without communicating it to the insurers, demanded a stamped policy. The insurers then for the first time required to be informed as to the amount of insurance upon the hull, and inserted in the policy (which the assured accepted) the following warranty,—“Hull warranted not insured for more than 2700*l.* after the 20th of March.”

The vessel was in fact insured for an additional 500*l.* in an insurance club, by the rules of which all ships belonging to members were insured from the 20th of March in one year to the 20th of March in the following year, “and so on from year to year unless ten days’ notice to the contrary be given,” and in the absence of notice the managers were to “renew each policy on its expiration :”—

Held, that, notwithstanding those rules, regard being had to the stat. 30 & 31 Vict. c. 23, ss. 7—9, the club-policy was not a continuing policy beyond the 20th of March of the current year, and that, the ship having been lost before that day, no new effective policy could have been made, and consequently that the warranty was complied with.

Held also that, the risk having been accepted by the insurers on the 11th of March, the addition on the 17th of a term for their benefit, and not affecting the risk, did not prevent the policy from being one drawn up in respect of the risk accepted on the 11th, and therefore, upon the authority of *Cory v. Patton* (Law Rep. 7 Q. B. 304), the non-communication of the loss was not a concealment of a material fact so as to avoid the policy.

affd in exch 22 Dec 1879
 DECLARATION: First count, upon a policy of insurance upon freight in respect of goods, &c., on board the ship *Mayflower*, at and from the Tyne to Argusteria in the sum of 400*l.*, alleging a total loss.

Pleas: 3. That the defendants were induced to make and subscribe the policy and to become insurers to the plaintiffs, as alleged, by the fraud of the plaintiffs (1); 4. That, at the time of the defendants making and subscribing the policy and becoming such insurers, as alleged, the plaintiffs and their agents misrepresented to the defendants a fact then material to be known to the defendants, and material to the risk of the said policy; 5. That, at the time of the defendants making and subscribing the policy and becoming such insurers, as alleged, the plaintiffs and their agents wrongfully concealed from the defendants a fact then known to the plaintiffs and their agents, and unknown to the defendants, and material to be known to the defendants, and material to the risk of the said policy, that is to say, that the ship and premises and goods had been and then were lost. Issue thereon.

At the trial before Brett, J., at the last Summer Assizes at Liverpool, the facts which appeared in evidence were as follows:—

On the 11th of March, 1871, a clerk of the plaintiffs named Robson went to the defendants' office with instructions to insure the *Mayflower* for 400*l.* on freight from the Tyne to Argusteria. He there saw Mr. Metcalfe, the secretary of the defendants' company, and an offer or proposal for the insurance was, according to the practice of the office, written by Robson, in Metcalfe's presence, in a book kept at the office for that purpose, called the "Order Book," or subsequently wafered or pasted therein, and Metcalfe agreed to accept the risk at a premium of 65*s.* per cent., and calculated the amount and debited it to the plaintiffs in the usual way, nothing being said at the time as to any special warranty to be inserted in the policy. It is not the practice of the defendants' company to give "slips" on accepting a risk; but a stamped policy is made out and sent a few days after the receipt of the proposal.

The *Mayflower* was lost on the Long Sand, near Harwich, on the 16th of March, and the plaintiffs had notice of the loss by telegraph early on the following morning. In the course of that day the plaintiffs sent their clerk Robson to the defendants' office to

(1) This plea was withdrawn at the trial, and a plea allowed to be added, that the warranty in the policy was not complied with. (See post, p. 218.)

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ask for a policy, but did not communicate to the defendants the fact that the *Mayflower* was then lost. The defendants' clerk, Alsopp, then for the first time inquired what the hull of the vessel was insured for. Robson went back to the plaintiffs' office to ascertain, and on his return told Alsopp that the vessel was insured for 2700%.; whereupon Alsopp filled up and gave Robson a policy with the following warranty inserted therein,—“Hull warranted not insured for more than 2700%.” The plaintiffs subsequently recollecting that there was a further insurance for 500% on the ship in the National Mutual Shipping Assurance Association of Teignmouth, which would expire by effluxion of time on the 20th of March, sent Robson back to get the policy altered by adding to the warranty the words “after the 20th of March,” which was accordingly done.

It was objected on the part of the defendants that the warranty in the policy was not complied with, because the policy with the National Mutual Shipping Assurance Association for 500% was a continuing policy, in the absence of notice to terminate it on the 20th of March, 1871, as provided by the rules of the association (1), and that the evidence to shew that such notice was given was insufficient; and that, inasmuch as the only legal contract between the parties was the stamped policy of the 17th of March mentioned in the declaration, and the loss which occurred on the 16th was known to the plaintiffs before the contract was complete and the policy was given out, the failure to communicate that fact to the

(1) Rule 1. “That the members of this association severally and respectively, not jointly or in partnership, nor the one for the other of them, but each only in his own name, insure each others' ships or shares of ships, from noon of the 20th day of March, 18—, or from the date of entry of each vessel respectively, until noon of the 20th day of March then next, and from that time until noon of the 20th day of March in the next succeeding year, and so on from year to year, unless notice to the contrary be given as hereinafter mentioned, against all losses,

perils, and damages of whatever nature or kind soever, which may be sustained or received by their respective ships, or caused or done by them to other ships or craft, except when on the voyages, in the trades, or under the circumstances, hereinafter particularly excepted.”

Rule 25. “That the managers, unless they receive ten days' notice to the contrary, shall renew each policy on its expiration, except in cases where it may be deemed expedient not to renew the same, when the managers shall cause notice to be given to the owner.”

defendants constituted a concealment of a material fact, and avoided the policy.

To this it was answered, that what passed on the 17th of March with reference to the warranty must be taken to relate back to the 11th, when the real and substantial terms of insurance were agreed on; and that the policy was not avoided by a stipulation subsequently inserted which in no degree affected the risk insured; and *Cory v. Patton* (1) was relied on to shew that an assured is not bound to make known to the underwriters facts which have come to his knowledge between the time of the giving out of the slip and the execution of the policy.

The learned judge left it to the jury to say,—first, whether the defendants had accepted the risk on the 11th of March,—secondly, whether there was any breach of the warranty,—thirdly, whether the fact that the vessel was lost was material to be known to the underwriters on the 17th of March.

The only evidence that a notice had been given to terminate the policy in The National Mutual Shipping Assurance Association was this:—The plaintiffs' clerk said: "A paper writing had been sent to the Teignmouth club. I believe it was sent on the 20th of February. At the same time I made a note against the 500*l*. policy in the plaintiffs' policy-book, to this effect,—'To be withdrawn before the 20th of March.'" Upon this the learned judge told the jury that, if they thought that meant that the policy was to expire on the 20th of March, and that notice was given, then the warranty was not broken; otherwise it was.

The jury found that the risk was accepted on the 11th of March, and that there was no breach of warranty, and that it was not material to communicate the loss on the 17th.

A verdict was thereupon entered for the plaintiffs for 400*l*; leave being reserved to the defendants to move to enter a verdict for them, if the learned judge ought to have directed the jury, as matter of law, that the warranty was not complied with, and that the fact concealed was material.

A rule having been obtained to enter a verdict for the defendants, on the ground that the judge ought to have directed the

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jury to find for the defendants, because there was concealment of a material fact, and that the warranty as to the amount of the insurance on the hull contained in the policy declared on was not complied with: or for a new trial, on the ground that the judge misdirected the jury as to what was to be deemed a concealment, and material to the risk, and as to the warranty being complied with, and improperly received an entry in the plaintiffs' book as evidence of such compliance; and also that the verdict was against the weight of evidence,—

Feb. 7. *Holker, Q.C.*, and *Gainsford Bruce*, shewed cause. This case is governed by *Ionides v. Pacific Insurance Co.* (1) and *Cory v. Patton*. (2) *Blackburn, J.*, in giving judgment in the former case, says (3): "The slip is in practice and according to the understanding of those engaged in marine insurances the complete and final contract between the parties, fixing the terms of the insurance and the premium, and neither party can without the assent of the other deviate from the terms thus agreed on, without a breach of faith." The "proposal" here represents the slip in ordinary cases. And in *Cory v. Patton* (2) it was held that, where underwriters have (as, by initialing a slip) made a contract of assurance, which, although invalid at law and in equity for want of statutory requisites, is nevertheless in practice, and according to the usage of those engaged in marine insurance, a complete and final contract binding upon them in honour and good faith whatever events may subsequently happen, the assured need not communicate to the underwriters facts which afterwards come to his knowledge material to the risk insured against; and the non-disclosure of such facts will not vitiate the policy of assurance afterwards executed. As to the warranty, there was abundant evidence that the 500*l.* policy would expire on the 20th of March: the policy-book was not admitted as evidence; it was merely referred to by the witness to refresh his memory as to a notice to discontinue that policy having been sent. Besides, no valid policy could have been executed by the Teignmouth club after the loss of the vessel; and the stat. 30 & 31 Vict. c. 23 and the rules of the club shewed that the policy was at an end on the 20th of March.

(1) Law Rep. 6 Q. B. 674; Law
Rep. 7 Q. B. 517.

(2) Law Rep. 7 Q. B. 304

(3) Law Rep. 6 Q. B. at p. 684.

Sect. 7 of that Act enacts that "no contract or agreement for sea insurance (other than such insurance as is referred to in s. 55 of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63),) shall be valid unless the same is expressed in a policy," &c.; and s. 8 enacts that "no policy shall be made for any term exceeding twelve months, and every policy which shall be made for any time exceeding twelve months shall be null and void to all intents and purposes." That clearly throws upon the defendants the onus of proof that a renewed policy had been issued by the club. The main point is whether there was a concealment of a material fact, so as to avoid the policy. It must now be assumed that the defendants accepted the risk on the 11th of March, all the terms of a complete insurance being then settled and agreed on. The warranty inserted on the 17th was no part of the contract.

[BRETT, J. The contract declared on is contained in the stamped policy with that warranty upon it.]

The defendants being bound in honour to issue a stamped policy on the terms of the contract of the 11th of March, it could not be at all material to them to be informed that the vessel was lost on the 16th. That is clearly decided by *Cory v. Patton*. (1) The fact concealed was perfectly immaterial so far as the warranty was concerned.

Herschell, Q.C., and *Crompton*, in support of the rule. The warranty that the hull was not insured for more than 2700*l.* after the 20th of March was not complied with. There being no evidence that notice to discontinue the 500*l.* policy had been given, it was, at the time the contract of insurance declared on was made, a subsisting insurance for another year. Rule 1 is not an undertaking to renew, but an absolute continuing insurance until notice.

[KEATING, J. Notwithstanding the statute 30 & 31 Vict. c. 23, s. 8, expressly enacts that "every policy which shall be made for any time exceeding twelve months shall be null and void to all intents and purposes?"]

Sect. 9 contains the following exception: "Any policy of mutual insurance having a stamp or stamps impressed thereon

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may, if required, be stamped with an additional stamp or stamps, provided that at the time such additional stamp or stamps shall be required the policy shall not have been signed or underwritten to an amount exceeding the sum or sums which the stamp or stamps previously impressed thereon will warrant." The 500*l.* policy was, according to the Teignmouth Club rules, a continuing policy unless notice was given to terminate it on the 20th of March. The only proper evidence of such notice having been given would be the notice itself. The mere statement of the plaintiffs' clerk that a paper writing had been sent, without shewing what that paper writing was, was clearly not sufficient; and the entry in the policy book did not carry the matter any further.

[KEATING, J. If the manager of the Teignmouth Club knew that the ship was lost on the 16th of March, would he still be bound to issue a stamped policy on the 20th?]

Unless the club insurance is a continuing insurance, there is an end of the first point. The important question still, however, remains, viz. whether there was a concealment of a material fact at the time the insurance was effected. The terms of the policy sued on (with the warranty clause) never were agreed on until after the loss was known to the assured; and the non-communication of the loss was a concealment of a material fact, which avoided the policy. It may be conceded, upon the authority of *Cory v. Patton* (1), that, notwithstanding the stat. 30 & 31 Vict. c. 23, the real bargain between the assured and the underwriters takes place when the slip containing the terms of the intended policy is accepted, and that a material fact coming to the knowledge of the assured between the date of the slip and that of the policy need not be communicated. Here, however, the terms were not agreed on until the 17th of March, after the loss of the *Mayflower* was known to the plaintiffs. That constitutes a material distinction between the two cases. How could the jury be warranted in finding that the contract declared on was entered into on the 11th of March, when one material term of it was only discussed and settled on the 17th? If a complete and final contract had been made before

(1) Law Rep. 7 Q. B. 304.

the loss was known, the fact would have been immaterial, and need not have been communicated. [*Morrison v. Universal Marine Insurance Co.* (1) was also referred to.]

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Feb. 8. The judgment of the Court (Keating, Brett, and Grove, JJ.) was delivered by

KEATING, J. This was an action on a marine policy of insurance upon freight, and was tried before my Brother Brett at the last Liverpool summer assizes, when a verdict was found for the plaintiffs for 400*l.*, as upon a total loss of freight.

It appeared that the plaintiffs, shipowners, being desirous of insuring the freight in question, on the 11th of March, 1871, sent to the defendants, who were underwriters at Newcastle-upon-Tyne, to inquire the terms of insurance, and ultimately an agreement was made at 65*s.* per cent., and a slip or proposal drawn up and accepted by the defendants at that rate. The slip contained all the necessary terms for a complete insurance at the above rate, and was drawn up without any question whatever being asked as to the amount of insurance upon the hull of the vessel.

On the 16th of March the ship was lost, and the plaintiffs knew of the loss on the 17th. They sent on that day to the defendants for a stamped policy in pursuance of the terms of the slip; and then for the first time the defendants required to know in what amount the hull of the ship had been insured. The plaintiffs had in fact effected insurances upon the ship amounting to 2700*l.*, and a further policy for 500*l.* with the Mutual Shipping Insurance Association of Teignmouth, of which he was a member, by which the insurance was to be for a year from the 20th of March preceding, with renewal from year to year unless determined at the end of a year by notice from either party. Upon the requirement of the defendants' clerk, the plaintiffs' clerk gave the amount insured on ship at 2700*l.*, when the defendants inserted that amount as a warranty in what they stated to be a copy of the policy. The plaintiffs, however, sent it back in consequence of its not including the amount insured by the policy for 500*l.* on ship;

(1) Law Rep. 8 Ex. 40.

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and the words "after the 20th March" were added, and a stamped policy with that warranty given out.

No communication was made by the plaintiffs to the defendants of the loss of the ship before or at the time of the delivery of the policy.

Upon this policy the plaintiffs sued; and the defences set up were, a non-compliance with the above warranty, and also a concealment of a material fact, viz. the loss of the ship.

At the conclusion of the plaintiffs' case, the defendants objected that the warranty was not complied with, because the policy for the 500*l.* was a continuing policy beyond the 20th of March unless notice to terminate it at that time were proved, and there was no evidence of such notice. They also objected that, inasmuch as the real and only legal contract between the parties was the stamped policy of the 17th of March declared on, and the loss having occurred on the 16th, and known to the plaintiffs on the 17th, the omission to communicate it on that day constituted the concealment of a material fact, and avoided the policy.

The learned judge asked the jury whether the warranty was complied with, and they found it was; and, in answer to other questions, they found that the risk was accepted by the defendants on the 11th of March, and that it was not material to make known the loss to the defendants upon the 17th. The verdict thereupon passed for the plaintiffs, with leave to the defendants to move to enter a verdict for them, if the judge ought to have directed the jury as matter of law that the warranty was not complied with, and that the omission to communicate the loss on the 17th was a concealment of a material fact, which avoided the policy.

A rule was obtained upon that ground, with the alternative of a new trial on the ground of misdirection, on the part of the learned judge in not so directing the jury, and also that the verdict was against the weight of the evidence. That rule has been argued; and the questions raised were those insisted on at the trial.

Mr. Herschell, for the defendants, argued, first, that the policy for the 500*l.* was a policy to continue beyond the 20th of March unless notice given; and, secondly, that there was no proof of notice. But it seems to me that, according to the terms of the

Teignmouth Mutual Shipping Insurance Association's rules, and the words of the statute 30 & 31 Vict. c. 23, that policy was not a continuing policy, and that in this case no new effective policy could have been made on the 20th of March, the ship having been lost before that day.

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This renders it unnecessary to consider whether the evidence to prove the notice was sufficient, if such notice had been necessary.

The great question, however, argued was whether there was a concealment of a material fact, so as to avoid the policy: and I am of opinion that there was not.

It was admitted by Mr. Herschell, in accordance with the decision of the Court of Queen's Bench in *Cory v. Patton* (1),—referring to *Ionides v. Pacific Insurance Co.* (2) in the Exchequer Chamber,—that, notwithstanding the provisions of 30 & 31 Vict. c. 23, ss. 7 and 9, the real bargain between the assured and the underwriters takes place when the slip containing the terms of the intended policy is accepted; and that, although such slip does not constitute a contract enforceable at law, yet it may be looked at for the purpose of discovering at what time the risk was really undertaken by the underwriters; and that a material fact coming to the knowledge of the assured between the date of the slip and that of the policy need not be communicated. Admitting this, however, Mr. Herschell contended with considerable force that, in this case, the slip on the 11th of March could not shew the terms of the bargain, as a negotiation between the parties was going on up to the 17th, when the policy containing the added warranty was issued, which contained the only complete contract of insurance between the parties, and therefore the case was distinguishable from *Ionides v. Pacific Insurance Co.* (2) and *Cory v. Patton.* (1)

In my opinion, however, the jury having found as a fact that the risk was accepted by the underwriters on the 11th of March, it cannot be said that the addition of a term for the benefit of the underwriters, and not affecting the risk, prevented the policy from being one drawn up in respect of the risk accepted on the 11th: the case, therefore, is the same in principle with that referred to,

(1) Law Rep. 7 Q. B. 304.

(2) Law Rep. 6 Q. B. 674; Law Rep. 7 Q. B. 517.

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and the occurrence of the loss subsequently to the 11th, though before the issue of the stamped policy, did not render it incumbent on the plaintiffs to communicate it, inasmuch as it could not affect the risk already accepted or the premium already agreed to and paid.

I think, therefore, there was no misdirection on the part of the learned judge, that the evidence justified the verdict of the jury and their answers to the questions put to them, and that the rule must be discharged.

GROVE, J. I entirely agree with the judgment pronounced by my Brother Keating; and I have nothing to add.

BRETT, J. I also entirely agree; and I will only add that when I allowed a plea to be added, I did so upon the understanding that the question was to be left to the jury upon the evidence as it then stood.

Rule discharged.

Attorneys for plaintiffs: *Mercer & Mercer, for Oliver & Botterell, Sunderland.*

Attorneys for defendants: *Williamson, Hill, & Co., for R. P. & H. Philipson, Newcastle-upon-Tyne.*

MORS-LE-BLANCH AND ANOTHER v. WILSON AND ANOTHER.

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Costs of Defending Action—Shipping—Bill of Lading, Construction of—Rights and Duties of Master where no Consignee appears to claim the Goods—Lien for Freight—Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), s. 68.

Where an action is brought against A. to recover unliquidated damages for which he has become liable through the default of B., notice being given to B. (who declines to intervene), A. is justified in defending the action, and is not bound to let judgment go by default, or to pay money into Court.

The proper questions for the jury in such a case are, whether it was a reasonable thing to defend the action, and whether the defence was conducted in a reasonable manner.

The defendants shipped coals on board the ship *Pitho* for Buenos Ayres, under a bill of lading making them deliverable to the consignees on payment of freight, and containing a memorandum,—“The coals to be taken from the ship as soon as the master is ready to deliver, or to be landed at the expense and risk of the consignees.”

The *Pitho* arrived at Buenos Ayres on the 28th of November, 1869, and the master was ready to deliver the coals on the 23rd of December; but, no consignees appearing to claim them, he waited until the 20th of January, 1870, and then landed them. In an action against the defendants for damages for the detention of the ship at Buenos Ayres, it was left to the jury to say whether the defendants were responsible for the detention, and what would be a reasonable compensation for it. The jury found that the defendants were responsible for the detention, and they assessed the damages at 56*l*. But the judge having, in answer to a question from one of the jury at the close of his summing-up, stated that, there being no evidence that there were warehouses at Buenos Ayres such as existed at Liverpool and other places, into which goods might be placed and kept subject to the shipowner's lien for freight, under the Merchant Shipping Act, 1862, the owners would lose their lien by landing the coals:—

Held, That, inasmuch as this answer was too general in its terms, and might have to some extent affected the assessment of damages, the defendants were entitled to a new trial.

Seem that, although there was no “statutable” warehouse at Buenos Ayres, the master might still have landed the coals there without losing his possession and control over them (placing them in a warehouse belonging to or hired by his owners), and so have preserved his lien for freight.

The first count of the declaration stated that, in consideration that the plaintiffs, at the request of the defendants, would receive in the Thames, in a ship called the *Pitho*, a large quantity, to wit, 47½ tons of coal, and would carry the same from thence to Buenos Ayres, and there deliver the same to the defendants or their assigns

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on certain terms, the defendants promised to and agreed with the plaintiffs that the said coal should be taken by the defendants or their assigns from the said ship as soon as the master of the ship was ready to deliver: Averment, that the plaintiffs did receive in the Thames in the said ship the said coal, and did, from thence carry the same to the port of Buenos Ayres, and they were and the master was ready and willing there to deliver the coal to the defendants or their assigns upon the said terms; and that, although all conditions (except such as the plaintiffs were prevented by the defendants from performing) were performed by the plaintiffs, and all things and times respectively happened and elapsed necessary to entitle the plaintiffs to have the coal taken from the ship by the defendants or their assigns, yet the defendants did not nor did their assigns take the coal from the ship, whereby the ship was necessarily detained, and the plaintiffs, who had chartered the ship, incurred a great liability to the owners of the ship for and on account of the detaining of the ship.

The second count stated that, in consideration that the plaintiffs, at the request of the defendants, would receive in the Thames in a certain ship called the *Pitho*, a large quantity of coal, to wit, $47\frac{1}{2}$ tons, and would carry the same from thence to Buenos Ayres, and there deliver the same to the defendants or their assigns on certain terms, the defendants promised that, in the event of the said coal not being taken by the defendants or their assigns from the ship when the master of the ship was ready to deliver the same according to the contract, the master might land the coal, and that the defendants would pay to the plaintiffs the expense incurred in and about such landing: Averment, that the plaintiffs did receive in the Thames in the said ship the said coal, and did from thence carry the same to Buenos Ayres, and they were and the master was ready and willing there to deliver the coal to the defendants or their assigns upon the said terms and according to the contract; but that the coal was not taken from the ship by the defendants or their assigns, although a reasonable time in that behalf elapsed before the coal was landed as thereafter mentioned; that the coal was landed, and in and about the landing of the same great expenses were incurred by the plaintiffs; and that, although all conditions were fulfilled and all times and things

elapsed and happened necessary to entitle the plaintiffs to land the coal and to incur the said expenses, and to be paid the said expenses by the defendants, yet the defendants had not paid the same or any part thereof.

The third and fourth counts were similar to the second and third, in respect of 80 tons of coal shipped by the *Majestic* for Monte Video. There was also a count for freight.

Pleas to each of the special counts: 1. That the defendants did not promise or agree, as alleged; 2. That the plaintiffs did not receive or carry the coals, as alleged; 3. That the plaintiffs were not nor was the master ready or willing to deliver the goods, as alleged; 4. That the defendants agreed to buy from the plaintiffs, and the plaintiffs agreed to sell to the defendants, and the defendants retained and employed the plaintiffs, and the plaintiffs promised the defendants and undertook, to put on board the said ship, and to carry and deliver to the defendants or their assigns, as in the count mentioned, certain coal called "smithy coal," and no other or different coal, and not the coal so received or carried as in the count mentioned; and that the plaintiffs, instead of selling and putting on board and receiving the coal so ordered by the defendants, put and received on board an entirely different coal from the said smithy coal, as the plaintiffs then well knew, and as the defendants did not know, until the time of the alleged breach in the count, and carried the same to Buenos Ayres [or Monte Video] as in the count mentioned, and they and the master were only ready and willing to deliver the said different coal as in the count mentioned, wherefore the defendants did not, nor did their assigns, take from the ship the last-mentioned coal, the same not being smithy coal, but being coal of an entirely different description, and totally valueless to the defendants or their assigns; which was the breach in the said count; and that the defendants did not promise otherwise than as in that plea above mentioned, and there was no receipt of coals otherwise than as above mentioned, that is to say, from the plaintiffs themselves, of the coals so carried as aforesaid, not being smithy coals or the coals so purchased as aforesaid; 5. A similar plea alleging the coals to have been bought by the plaintiffs for the defendants. To the last count there was a plea of never indebted. Issue thereon.

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The cause was tried before Brett, J., at the last Summer Assizes at Liverpool, when the following facts were proved:—

The plaintiffs are merchants carrying on business in Liverpool and London. The defendants are also merchants carrying on business at Liverpool and Buenos Ayres. The plaintiffs having chartered two vessels called the *Pitho* and *Majestic*, the former for Buenos Ayres and the latter for Monte Video, the defendants agreed to buy from them certain smithy coal to be shipped on the defendants' account by those two vessels, consigned to their correspondents at Buenos Ayres and Monte Video, respectively, viz. 47½ tons by the *Pitho*, and 80 tons by the *Majestic*. By the bills of lading, which were dated respectively the 10th of July and 12th of August, 1869, a freight of 30s. and 27s. per ton was to be paid by the consignees; and there was a memorandum in the margin, as follows:—"The coals to be taken from the ship as soon as the master is ready to deliver, or to be landed at the expense and risk of the consignees."

The *Majestic* arrived at Monte Video, and the master was ready to deliver the coals on the 24th of January, 1870. No one claiming the coals, the master advertised for the consignees, and at length one of the defendants came on board and inspected the coals, but he declined to receive them, alleging that they were not "smithy coal." After a delay of some days, the coals were landed under a decree of the Tribunal de Commerce. By this refusal of the consignee to accept the coal, and the proceedings in the Tribunal de Commerce, the *Majestic* was detained at Monte Video until the 12th of March. For this detention, the ship-owner brought an action against the now plaintiffs upon the charter, claiming damages, there being no stipulation for demurrage. The now plaintiffs gave the defendants notice of the action having been brought, and, the latter declining to interfere, the now plaintiffs defended it, and the jury found a verdict against them for 56*l.*, being fourteen days detention, at 4*l.* per day; and that verdict was upheld by the Court. The costs incurred by the now plaintiffs in that action amounted to 208*l.*

The *Pitho* arrived at Buenos Ayres on the 28th of November, 1869, and the master was ready to deliver the coal on the 23rd of December; but, notwithstanding that advertisements were pub-

blished, no consignees appeared to claim it, and it was ultimately landed on the 20th of January, 1870.

The present action was brought to recover from the defendants 179*l.* 5*s.* due for the carriage of the coal, the 56*l.* recovered by the owner of the *Majestic* against the plaintiffs for the detention of that ship at Monte Video, and 208*l.* the costs of the action and defence in that case, and also damages for the detention of the *Pitho* at Buenos Ayres.

The judge left it to the jury to say, first, whether the defendants were responsible for the detention of the vessels at Monte Video and Buenos Ayres, and what would be a reasonable compensation for that detention; secondly, whether it was a reasonable thing for the plaintiffs to defend the action brought against them by the owner of the *Majestic*; thirdly, whether that action was defended in a reasonable manner.

The jury assessed the damages for detention in the case of each vessel at 56*l.*, being fourteen days, at 4*l.* per day; and they answered the second and third questions in the affirmative.

The foreman of the jury having, at the close of the summing-up, asked whether the captain would have lost his lien for freight upon the coal if he had landed it at once, the judge told them that, there being no evidence that any such warehouses existed at Buenos Ayres as there were at Liverpool, London, and other large commercial cities, into which goods might be placed and kept subject to the ship-owner's lien for freight, under the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), s. 68, and other Acts, the owners would have lost their lien by landing the coal.

A verdict was thereupon taken for the plaintiffs for 499*l.* 5*s.* being 179*l.* 5*s.* for freight, 112*l.* for the detention, and 208*l.* the costs paid and incurred in defending the action at the suit of the owner of the *Majestic*.

Holker, Q.C., in Michaelmas Term last, moved to reduce the damages by 208*l.*, the costs above referred to; or for a new trial, on the ground that the verdict was against the weight of evidence, and also on the ground that the judge misdirected the jury in telling them that, if the masters of the vessels landed the coal, the shipowners would lose their lien for freight, and that they

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could not land the coal without losing their lien. As to the costs, —having no answer to the action brought against them by the owners of the *Majestic*, the plaintiffs ought not to have defended.

[BRETT, J. No demurrage being specified in the charterparty the claim against the charterers was for unliquidated damages; and the present defendants refused to take up the defence of that action. What could the plaintiffs do under the circumstances?]

They might have allowed judgment to go against them by default, an assessment of damages being far less costly than a trial; or they might have paid money into Court: *Short v. Kalloway* (1); *Tindall v. Bell*. (2)

[BRETT, J. Both those cases are referred to in 1 Smith's L. C., 6th ed., p. 149, and the note goes on: "And, where the plaintiff's claim is of an unliquidated nature and needs investigation, it seems that he [the defendant] may, unless expressly forbidden, incur the expense of investigating it, or at least that very slight evidence is enough to raise an inference that the person ultimately liable has assented to his doing so: *Blyth v. Smith*. (3) It seems to be for the jury in each case to say whether, in defending, and incurring the costs sought to be recovered, the plaintiff pursued the course which a prudent and reasonable man unindemnified would do in his own case; and, if the jury find that he did, the costs may be recovered."]

As to the reasonableness of the defence, the verdict was clearly against the weight of evidence.

[BOVILL, C.J. Who but the jury could be the proper judges of the reasonableness of the defence?]

As to the master's right to land the coal, the learned judge misdirected the jury in telling them that he could not do so without abandoning his lien for freight.

[GROVE, J., referred to Smith's Mercantile Law, 8th ed. p. 559.

BRETT, J. The Acts of Parliament by which the ship-owner's lien is preserved do not apply to Buenos Ayres or Monte Video.]

BOVILL, C.J. Upon the first point raised in this case, viz. the plaintiffs' right to recover the costs incurred by them in the action

(1) 11 A. & E. 28.

(2) 11 M. & W. 228

(3) 5 Man. & G. 405.

brought against them by the owner of the *Majestic*, it seems to me that the proper question was left to the jury by my Brother Brett, viz. whether it was a reasonable thing for the plaintiffs to defend that action, and whether the defence was conducted in a reasonable manner. This question is constantly arising in a variety of forms. A party is frequently put to considerable difficulty where the action is brought for unliquidated damages. As a general rule, he must not recklessly defend the action, and so heap upon the person eventually liable unnecessary expense. But, on the other hand, if he places all the facts before the person whom he seeks to charge, and that person declines to intervene, and leaves him to take his own course, it surely must be for the jury to say whether it was reasonable to defend, and whether the defence was conducted in a reasonable manner. I do not see what other question could be left; and we have the authority of Parke, B., in *Tindall v. Bell* (1), for saying that it is the only proper question. If, under the circumstances, it would have been more prudent to settle the claim by a compromise, or to pay money into Court, or to allow judgment to go by default,—that would have afforded topics for observation and comment: but it must at last be left to the jury; the judge could not take upon himself to decide it as a matter of law. I therefore think there was no misdirection in this respect. Then, it is said that the verdict was against the weight of evidence. The circumstances of the case were very peculiar. The whole matter was before the jury; and my Brother Brett does not report to us that he is dissatisfied with the result. I think, therefore, there should be no rule on that ground. Another question, however, has been raised which from the peculiar form of the bill of lading becomes of some importance, viz. as to what would have been the effect, as to the masters' lien for freight, of landing the goods at their ports of destination. That is a point which I think deserving of consideration, and upon that the rule may go.

GROVE, J. I am of the same opinion. The question as to the right to recover the costs of defending an action has frequently arisen. Formerly it was held that the person against whom the action was brought was bound to defend, giving notice to the person

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(1) 11 M. & W. 228, at p. 231.

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whose default caused it to be brought. That is now no longer the rule; and the proper course is that which was pursued here, viz. to leave it to the jury to say whether or not it was a reasonable thing to defend, and whether the defence was conducted in a reasonable manner. It is impossible for the judge to lay down any absolute criterion. It might be right to compromise in one case, but not in another. The jury in this case have found that it was a reasonable thing to defend the action, and that the defence was conducted in a reasonable manner. The learned judge is not dissatisfied with their finding, and I see no ground for a new trial on that point. The direction of my Brother Brett, however, as to the effect upon the masters' lien of the landing of the coal, seems to present a question very fit for discussion.

DENMAN, J., concurred.

Rule nisi.

C. Russell, Q.C., and Trevelyan, shewed cause. The clause in the margin of the bill of lading was introduced for the benefit of the ship-owner, and not in restraint of his rights. If there had been no such clause, it is quite clear that, so long as there was any reasonable probability of a consignee turning up, the ship-owner had a right to hold the coals in his own hands, in order to secure his lien. He does not cease to be a carrier by sea immediately on the arrival of the ship at the port of destination of the goods. He is not bound to land the goods immediately, even though, by force of the memorandum or otherwise, he could still preserve his lien for freight: *Black v. Rose*. (1) Assuming, therefore, that the answer given to the question put by a jurymen after the summing-up was incorrect, it was wholly immaterial. There is very little authority upon the question whether the master can, under an ordinary bill of lading, and independently of the provisions of the Merchant Shipping Act, 1862, land the goods and still retain his lien for freight. In the 5th edition of Abbott on Shipping, p. 248, the learned author treats the subject very cautiously. He says: "In England, the practice is to send such goods as are not required to be landed at any particular dock, to a public wharf, and order the

(1) 2 Moore, P. C. (N.S.) 277.

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wharfinger not to part with them till the freight and other charges are paid, if the master is doubtful of the payment. And, by the law of England, if the master once parts with the possession out of the hands of himself and his agents, he loses his lien or hold upon the goods, and cannot afterwards reclaim them." This is repeated in all the subsequent editions; and it is amplified in Smith's Mercantile Law, 7th ed., p. 564, 8th ed., p. 559: "As a lien is a right to retain possession, it follows of course that, where there is no possession, there can be no lien. It also follows that, where the possession of the goods has once been abandoned, the lien is gone; but, where the master of a ship, in obedience to revenue regulations, lands goods at a particular wharf or dock, he does not thereby lose his lien on them for the freight; and, where they are not required to be landed at any particular dock, the common practice is, to land them at a public wharf, and direct the wharfinger not to part with them till the charges upon them are paid; in this case, the wharfinger is the ship-master's agent, and the goods remain in the constructive possession of the latter," that is, of the master. The judgment of Willes, J., in *Meyerstein v. Barber* (1) is to the same effect. In MacLachlan's Supplement, p. 42, the author, observing upon these provisions of the Merchant Shipping Act, 1862, says: "Hitherto, except at certain ports which are privileged by Act of Parliament, it has been a difficulty of great practical moment what course to advise a ship-master to follow, when, in consequence of differences between the parties concerned, the consignee of the cargo refuses to accept the goods. At one of the privileged ports he could land and warehouse the cargo, subject to his lien for freight, thereby saving all rights at the least possible expense. Elsewhere this could not be done, because his lien for freight, being at common law as distinguished from a maritime lien, would have been destroyed by the transfer of possession." In the present case, there was no evidence that there was any privileged warehouse at Buenos Ayres into which the coals could be transferred so as to preserve the master's lien; and therefore the master could not have got rid of his liability as carrier by landing them.

[BRETT, J. If the master landed the goods and placed them in

(1) Law Rep. 2 C. P. 38, at p. 53; Ex. Ch. Law Rep. 2 C. P. 661; Dom.

Proc. Law Rep. 4 H. L. 317.

(11) SC 12 Jan 45. 1020

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an ordinary warehouse, the warehouseman would have a lien upon them for the warehouse-rent. Would the master have a lien also?]

Clearly not: *Syeds v. Hay* (1); *Somes v. British Empire Shipping Co.* (2) To preserve the ship-owner's lien there must be a continuance of the custody of the goods in him.

Holker, Q.C., and *Baylis*, in support of the rule. The ship-owner is bound to deal with the goods in a reasonable manner. He cannot retain them on board for an indefinite period, and then charge the consignee (or the consignor) with demurrage. In this case, supposing there was no public warehouse into which the coals could be landed, the master might have hired space in an ordinary warehouse and still retained his lien. This is quite in accordance with what is laid down in Smith's Mercantile Law, Abbott on Shipping, Maclachlan on Shipping, and in the judgment of Willes, J., in *Meyerstein v. Barber*. (3) The judge here in effect told the jury that the master could not take the coals out of the ship and still retain his lien. That clearly was a misdirection. It is not the landing the goods, but the parting with the possession of them, that destroys the lien. If the master delivers the goods to the consignee, or to any one who represents him, so that they have become at his risk, the lien is gone. The only difference which the statute makes is this, that, whereas formerly the ship-owner might have preserved his lien by depositing the goods in a warehouse of his own, he would have done so at his own risk, he may now deposit them in a public warehouse without that risk.

[BRETT, J. In *Erichsen v. Barkworth* (4), Crompton, J., says: "As to the not unloading after those days (the lay days) the jury would have to estimate the damage; and, if they found that there was any vexatious conduct on the part of the ship-owner, such as keeping the goods for his own benefit, they would give little damages. After the demurrage days, he cannot keep the goods for an unlimited time, and then sue for damages." If the master cannot keep the goods, he must put them on shore.]

(1) 4 T. R. 260.

(2) 8 H. L. C. 338; 30 L. J. (Q.B.)

229. *6 Jan H.S. 761*

(3) Law Rep. 2 C. P. 38. *18 Jan H.S.*

(4) 3 H. & N. 894; 28 L. J. (Ex.)

95. *5 Jan H.S. 517.*

The marginal clause here was no doubt introduced in favour of the ship-owners,—to enable them to land the coals so that they should be at the risk of the consignees, and the lien be still preserved.

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[BRETT, J. It enabled the master to land the goods at once. Your argument is, that it obliged him to do so.]

Assuming that contention not to be sustainable, still the direction was calculated to mislead the jury, and to induce them to give larger damages than they would otherwise have given. *Black v. Rose* (1) is not very intelligible, and at all events does not decide this point.

[At the suggestion of the Court, it was agreed that the rule should be discharged, the verdict being reduced by the 56*l.* given for the detention of the *Pitho* at Buenos Ayres.]

KEATING, J. The case having been summed up by my Brother Brett to the jury in a way which could not be complained of, one of the jury asked him whether the captain could have discharged the cargo at the port of destination and still retained his lien for the freight. I must confess I should have thought that that question was intended to be put with reference to the circumstances which had been proved before the jury; and therefore, if the learned judge had simply answered it in the negative, I should have been of opinion that the answer was correct, because there was no evidence that there were any public warehouses at the ports in question. But the learned judge certainly appears to have used language which by possibility might have induced the jury to think that under no circumstances could the master have discharged the coal without losing his lien. I am disposed to think that that is too wide a proposition; because, whatever may be the law if the goods are landed and lodged in a general warehouse, whereby another and an independent lien might be given to the warehousekeeper, I think it is competent to the master to land the goods and still preserve his lien on them, by placing them in a warehouse over which he or the consignee of the ship has exclusive control. I am therefore indisposed to sustain the proposition of the learned judge to its full extent. What effect,

(1) 2 Moore, P. C. (N.S.) 277.

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if any, it may have had on the minds of the jury, it is impossible to say with certainty; that is matter of speculation only. Mr. Holker, no doubt, is justified in complaining of that part of the direction as affecting the damages: but I am fully persuaded that, if it affected the damages at all, it was only to a very small extent; and the parties have wisely, I think, agreed to a reduction of the verdict by a sum which in my judgment exceeds the amount by which the damages could possibly have been influenced by the mode in which the question of the juryman was answered. Under the circumstances, therefore, the rule will be discharged, the verdict being by consent reduced to 443*l.*, and each party paying his own costs of this rule.

GROVE, J. I am of the same opinion. It appeared to me when the rule was moved,—and I have heard nothing to induce me to alter that impression,—that it could not be law that under no circumstances could the master land the cargo without parting with his lien for freight. The authorities, as it seems to me, go only to this extent, that, if the goods are landed, they must, in order to preserve the lien, be so landed as to retain the master's absolute and entire dominion over them,—a thing which can rarely be done. The answer of my Brother Brett to the question put to him was qualified only by the supposition that there were public bonded warehouses at the port of discharge. But the doubt I entertain is as to the sense in which we ought to understand the question, after the way in which the learned judge had summed up the case. I strongly incline to think that all that was meant by the question was, whether, if the master lands the goods at an ordinary landing place, and puts them into an ordinary warehouse, he thereby parts with his lien. Undoubtedly, if the question was put in that sense, the answer would have been correct; and because the answer in its terms goes somewhat further, we are called upon to say that the question was not put in that sense. There is this further question, viz. whether, within the rule laid down in *Crease v. Barrett* (1) and other cases, the Court would grant a new trial where the misdirection has not conducted to a wrong verdict. In the present case I cannot possibly see that, if the alleged misdirection had not taken place, the jury could have

(1) 1 C. M. & R. 919.

reduced the damages by more than 56%. That, I think, is the maximum that can possibly be taken off.

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BRETT, J. I am of opinion that the answer I gave to the question put to me by the juryman was wrong, because it included the case of the master landing the goods and depositing them in a warehouse where they would remain under his own control, and that it was incorrect to say that in such a case as that the master would lose his lien for freight. The point, as it seems to me, is by no means an easy one. This is a case in which the goods, when landed, would be landed in a port where the English statutes relating to public warehouses do not apply. There was no evidence as to what the foreign law was, and therefore the question is, what are the rights of a master at a port where there is no English warehousing statute in force and no evidence of any law different from the law of England. The authority of Crompton, J., in *Erichsen v. Barkworth* (1), seems to me to shew that there may be a case in which the master may land and yet retain his lien upon the goods; because that learned judge says that, even where the consignee has neglected to accept the goods,—and therefore where he must be assumed to be in fault,—the master cannot keep the goods on board his ship for an unreasonable time. What must he do with them then? It seems to me to follow that there must be some way of landing them by which his lien may be preserved; and I feel now clear that Crompton, J., had it in his mind that the master might land the goods and still preserve his lien for freight, if he kept them still entirely under his own exclusive control. The dictum of Willes, J., in *Meyerstein v. Barber* (2), seems to me to be to the same effect; and so also is the passage cited from Abbott on Shipping, because, if by “practice” he means the universal practice of merchants, it becomes, as it seems to me, part of the mercantile law. Whether the master can preserve his lien irrespectively of English statute-law as to public warehouses or of any foreign law equivalent thereto, by putting them into a warehouse belonging to a third person, is a question which it is not necessary for us now to decide. The difficulty which presents itself against the master’s retaining

(1) 3 H. & N. 894; 28 L. J. (Ex.) 95.

(2) Law Rep. 2 C. P. 38. 12th Feb. 1873

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his lien in such a case seems to me to be this, that then another and an independent lien would exist; and I very much doubt whether, if the master were so to deposit the goods on shore as to give another person a lien upon them, he would not as a matter of course lose his own lien, even though such other person should undertake to the master not to deliver the goods to the consignee without being paid the master's claim for freight. But it is not necessary to decide that upon this occasion. I therefore think that the answer which I gave to the question put to me was wrong in its terms. I think the proper answer would have been this,—“Under certain circumstances the master may do so; but there is no evidence that he could have done it in this case.” If that had been the answer given, I should have been prepared to maintain it; but the answer I did give was wrong, and likely to lead the jury to a wrong conclusion. I think it might have affected their verdict, though to a very small extent. Whether it could have affected it to the extent of 56*l*. I doubt; because it does not by any means follow that, even if the master could have landed the goods so as to preserve his lien, he was bound to land them; and the jury would have had to consider whether under the circumstances of the case he had acted unreasonably in keeping the goods on board for the time he did. Still, strictly speaking, the defendants would probably have been entitled to have the rule made absolute for a new trial; but they have very properly given way, and have thereby obtained the full amount of any difference which could have been caused by the misdirection. Under the circumstances, therefore, I entirely agree with the rest of the Court that the verdict should be reduced to the sum agreed on, each party paying their own costs of this rule.

Rule discharged accordingly.

Attorneys for plaintiffs: *Gregory, Rowcliffes, & Rawle, for H. Forshaw & Hawkins, Liverpool.*

Attorneys for defendants: *Gregory, Rowcliffes, & Rawle, for Hull, Stone, & Fletcher, Liverpool.*

[REGISTRATION CASES.*]

BROWN, APPELLANT; TAMPLIN, RESPONDENT.

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Nov. 20.

Parliament—Registration Appeal—Notice of Intention to Prosecute—Reasonable Time for giving Notice—Registration Act, 1843 (6 Vict. c. 18), s. 64.

A revising barrister signed the case and appointed the respondent in a consolidated appeal on the 31st of October, and the 13th of November was the first day appointed by the Court for the hearing of registration appeals. The appellant did not give notice to the respondent of his intention to prosecute the appeal until the 4th of November. The respondent did not appear:—

Held, that the Court could not, under the proviso to the 64th section of the Registration Act, 1843, take into consideration any circumstances to excuse the not giving of the ten days notice required by the section, except the absence of reasonable time for giving such notice; and that there was reasonable time in the present case for giving such notice, and, consequently, that the appeal could not proceed.

THIS was a consolidated appeal from the decision of the revising barrister for the borough of Marylebone.

The 13th of November was the first day fixed for hearing registration appeals, and notice had not been given to the respondent by the appellant of his intention to prosecute the appeal until the 4th of November. The respondent did not appear, and the hearing of the appeal was postponed on the 13th of November, without prejudice to the question whether the Court would ultimately allow it to proceed on a subsequent day. (1)

Application was now made to the Court that the appeal might

* For convenience of reference the Registration Cases for this year are all collected here irrespective of the term in which they were decided.

(1) The 64th section of the Registration Act, 1843 (6 Vict. c. 18), provides that "no appeal shall be heard by the said Court in any case where the said respondent shall not appear, unless the said appellant shall prove that due notice of his intention to prosecute such appeal was given or sent to the said respondent ten days at least before the

day appointed for the hearing of such appeal: Provided always, that if it shall appear to the said Court that there has not been reasonable time to give or send notice in any case, it shall be lawful for the said Court to postpone the hearing of the appeal in such case as to the said Court shall seem meet."

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proceed, upon an affidavit of the appellant's attorney, which stated the following facts:—"The case was not settled by the revising barrister, nor was the respondent appointed (it being a consolidated appeal) until the 31st October, 1872. George Tamplin, the respondent, objected to be appointed respondent, and after the case was settled there was a discussion with the revising barrister as to the right of the latter to appoint the said George Tamplin respondent against his will. The revising barrister also required, after he had settled the case, to compare the schedule with his lists. Under these circumstances I promised that I would not deposit the said case until Monday, the 4th day of November, before which day the revising barrister had satisfied himself that the schedule was correct, and no one agreeing to become respondent, no alteration was made in the appointment of the said George Tamplin as such respondent; but I did not know for certain, until the 4th of November instant, whether some other person might not have agreed to become respondent, in which case such last-mentioned person would have been appointed respondent to the appeal."

Tamplin, the respondent, was the returning officer of the borough. (1)

Sir J. B. Karlake, Q.C. (H. Tindal Atkinson with him), in support of the application, contended that there had not been reasonable time, under the circumstances, for the giving of the notice, the case not having been signed by the revising barrister until the 31st of October, and the appellant having been to some extent misled by the doubt which existed as to whether Tamplin was finally appointed respondent, or whether somebody else would not be substituted.

In the course of the argument the following cases were referred to: *Lockett v. Gilder* (2); *Aldworth v. Dore* (3); *Newton v. Mobberley* (4); *Palmer v. Allen*. (5)

BOVILL, C.J. If it were open to us to allow this appeal to be

(1) See 6 Vict. c. 18, ss. 43, 44, 101.

(3) 5 C. B. 87.

(2) 11 C. B. (N.S.) 1; 31 L. J. (C.P.) 143.

(4) 2 C. B. 203; 15 L. J. (C.P.) 154.

(5) 5 C. B. 5; 18 L. J. (C.P.) 265.

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heard, I for one should be very glad to do so; but we are, in this case, exercising a jurisdiction that is strictly defined by the statute. The decisions on the subject in this court have been uniformly to the effect that the Court has no discretion to exercise in the matter, but must rigidly follow the directions of the Act. In *Aldworth v. Dore* (1), Wilde, C.J., said, "I have a strong opinion upon the necessity of adhering strictly to the provisions of this Act of Parliament, and we ought not to hold that the proviso in the 64th section applies, except upon substantial grounds." So also in *Palmer v. Allen* (2), the same judge stated that ignorance of the provisions of the statute could be held no excuse for non-compliance with its provisions. We must deal with this case with reference to these decisions. The provisions of the 64th section are as follows. [His lordship read the section.]

The first day fixed for hearing appeals was the 13th of November, and the question is, whether, in this case, there was a reasonable time for giving ten days notice before that day. Of course, until a respondent was appointed, no notice could be given. The Act contemplates, in the first instance, some person willingly becoming respondent; but here, though a very large number of votes depended on the result, there was no one who was willing to be respondent. Thereupon it became the duty of the revising barrister to appoint a respondent in accordance with the provisions of the Act, which provides that certain official persons may be named, if no one else is willing to be respondent. (3) In this case Mr. Tamplin, the returning officer, was distinctly nominated, and the case signed on the 31st of October. When the case was so signed and delivered to the appellant, he had to act upon it, by transmitting it to the masters of this court and giving notice to them of his intention to prosecute the appeal. He had also to give notice to the respondent ten days before the first day appointed for hearing the appeals, which was the 13th of November. There was no other respondent than Tamplin, and he had been duly appointed in compliance with the Act. I am at a loss to see what difficulty there was in complying with the provisions of the Act. The appellant may perhaps have thought that Tamplin's appoint-

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(1) 5 C. B. 87.

(2) 5 C. B. 5; 18 L. J. (C.P.) 2C5.

(3) See 6 Vict. c. 18, ss. 43, 44, and 101.

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ment was not complete without his consent; but it is not because the appellant has overlooked or mistaken the effect of the provisions of the Act that the Court can enlarge the time for giving notice. That can only be done when there has not been a reasonable time for giving notice, and in this case it is clear that there was a reasonable time.

KEATING, J. I have come to the same conclusion, though somewhat reluctantly. The simple question is, whether there was reasonable time for giving notice. Clearly, it appears to me that there was; that being so, we have no discretion in the matter.

BRETT, J. The day appointed for the hearing of appeals was the 13th of November, and ten days notice was certainly not given before that day. Therefore the case comes within the first part of the 64th section. The question arises whether this case is within the proviso. I am not quite so clear on that point as my Lord; but I think on the whole that it has not been shewn to us that there was not reasonable time. The respondent was named and the case signed on the 31st of October, and twelve days elapsed between that day and the 13th of November.

DENMAN, J., concurred.

Application refused.

Attorney for appellant: *Beddall.*

THE EARL BEAUCHAMP, APPELLANT; THE OVERSEERS OF
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THE MARQUIS OF SALISBURY, APPELLANT; THE OVERSEERS OF
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THE SAME, APPELLANT; BONTEMS, RESPONDENT.

THE SAME, APPELLANT; BULWER, RESPONDENT.

Parliament—County and Borough Vote—Disqualification of Voter—Peer of

Parliament—Duty of Revising Barrister.

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A peer of parliament is incapacitated from voting at an election for members of the House of Commons; and is therefore not entitled to be placed on the register of voters.

The revising barrister ought to strike out the name from any list on it being proved to be that of a peer of parliament, although no notice of objection has been given.

THE first of these cases was an appeal from the revising barrister for the western division of the county of Worcester.

The name of the appellant appeared in the overseers' list of persons claiming to vote in respect of "freehold house and land."

No objection was made to the name of the claimant on the list. But, as it was proved that the claimant was a peer of parliament, and had taken his seat in the House of Lords, the revising barrister decided that he was not entitled in law to have his name inserted in the register, and expunged it.

The second case was an appeal from the revising barrister for Middlesex, and was precisely similar to the first case.

The third and fourth cases were appeals from the revising barristers for Herts and South Essex respectively, and differed only from the others in that the name of the Marquis of Salisbury had been objected to in each case.

A. Wills, Q.C., for Lord Beauchamp. The question intended to be raised here is, whether a peer of parliament is entitled to be placed upon the register of voters in the election of members of parliament. It is difficult to contend that such a right exists, when every principle of the constitution and all the authorities upon the subject are opposed to it, and the most diligent search has failed to discover a single atom of authority in its favour. It

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is true that, in very early times, expressions are to be found in Acts of Parliament and in the precedents of parliamentary writs which might seem to give some colour to the notion that peers and peeresses did formerly take part in the proceedings of the county courts, or even in elections and returns themselves: see 3 Prynne's Parliamentary Writs, 152 et seq., and stat. 7 Hen. 4, c. 15; Heywood's County Elections, 316; but all these were referred to and considered when the claims of women to be registered as electors under the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), were negatived by this Court: see *Chorlton v. Lings*. (1) If not available upon that occasion, they cannot avail here. All the precedents there relied on were anterior to the 25 Hen. 6, since which time no trace is to be found of a peer having been party to the return of a burgess or knight of the shire. On the other hand, we find it laid down in books of the highest authority that peers have no right to interfere in elections: see 2 Inst. 29; 4 Inst. 2, 15, 28, 50; 1 Bl. Com. 163; and see the form of the writ of election, Heywood's County Elections, 1. This is a matter which touches the law of parliament. Each House declares for itself what the law is upon the subject of its own constitution and practice; each acts as a Court in that respect. The House of Commons has a right to declare the law as to who are to be allowed to vote at or to interfere in the election of its members; and it has frequently done so by resolution, and by the decision of election committees since the Grenville Act (10 Geo. 3, c. 16). In 1699, in consequence of the Earl of Manchester having voted at an election for Malden, the House of Commons resolved "that no peer of this kingdom hath any right to give his vote at the election for any member to serve in parliament:" 13 Commons Journals, 64; and again, in 1700, it was resolved by the House that, "if a peer or lord-lieutenant of a county concerns himself in elections, it is an infringement of the liberties of the Commons;" and these resolutions (which have been repeated in each session of parliament since) are given in Com. Dig. *Parliament* (D. 10.), where they are adopted as a statement of the law. No trace is to be found in the books between 25 Hen. 6, the date of the last precedent of an election return in

[(1) Law Rep. 4 C. P. 374.

Prynne, and the year 1699, when the resolution first referred to was come to, of the vote of a peer having been held good. In Heywood's County Elections, 2nd ed. p. 317, it is said: "After the union of the kingdoms of Great Britain and Ireland, it became necessary to make some alterations in the standing orders of the House; and on the 30th of October, 1801, some motions being made respecting the voting and interfering of peers at elections, the debate was adjourned, and a committee appointed to report. On the 7th of November, 1801, the committee reported several resolutions, which afterwards, 27th of April, 1802, were adopted and made standing orders of the House, and as such have been repeated at the beginning of every subsequent session:—

'Resolved, that no peer of this realm, except such peer of that part of the United Kingdom called Ireland as shall for the time being be actually elected and shall not have declined to serve for any county, city, or borough of Great Britain, hath any right to give his vote in the election of any member to serve in parliament.' 'Resolved, that it is a high infringement of the liberties and privileges of the Commons of the United Kingdom for any lord of parliament or other peer or prelate, not being a peer of Ireland at the time elected and not having declined to serve any county, city, or borough of Great Britain, to concern himself in the election of members to serve for the Commons in parliament, except only any peer of Ireland at such elections in Great Britain respectively where such peer shall appear as a candidate or by himself or any other be proposed to be elected; or for any lord-lieutenant or governor of any county to avail himself of any authority derived from his commission to influence the election of any member to serve for the Commons in parliament.' In the case of Banbury, 1808, the vote of an Irish peer was objected to and given up as too clear a case to be argued, upon the words of the before-mentioned standing order." Several instances of the votes of peers having been rejected are to be found in Elliott on Registration, 2nd ed. p. 261, and Rogers on Elections, 10th ed. p. 177 et seq.: and see May's Parl. Pr. 6th ed. 604. On the 27th of June, 1853, during a debate in the House of Lords upon a motion for a committee to inquire into corrupt practices at an election at Tynemouth (128 Hansard, 3rd series, 790, 791), Lord Brougham

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having intimated that, in his opinion, "there was no law to prevent a peer using his influence at an election," Lord Campbell said, that, "as his noble and learned friend had broached a question of great constitutional importance, and one which he had frequently and deliberately considered, he thought himself bound to express his opinion upon it. The question was whether a peer had any right to vote for a representative in the Commons House of Parliament. He was clearly of opinion that a peer had no such right or power. He placed no importance at all upon the resolution of the House of Commons. That House could not make laws. It might declare what the law was; but it could not by any resolution it might pass alter the constitution of the country; and the case of lord-lieutenants shewed that the resolution against peers, by itself, had no weight. But, irrespective of that resolution,—by immemorial usage, by authority, and by reason,—he was clearly of opinion that not one of their lordships, who sat there by hereditary right or by grant of the Crown, had any right to interfere in any election of a representative of the people. That was the House of Peers; the other was the Commons House of Parliament: and it was for the Commons to send their representatives there to act for them, to grant the supplies, and to give their opinion upon Acts of Parliament and the general legislation of the country. Their lordships legislated in that House by hereditary right; but, having that right, they should be contented with it, and not send forth a groundless claim to be represented in the other House." Lord Brougham thereupon intimated a hope "that his noble and learned friend would not believe that he entertained the notion that a peer had a right to vote in the election of a member in the House of Commons. He never dreamt of such a thing. He mentioned the case of the Duke of Norfolk, to shew the difference of opinion which existed upon the subject; and all he wished to protest against was, the presumed validity of the resolution of the House of Commons that it was a breach of privilege for a peer to interfere in an election." The matter came again before the House of Lords on the 5th of July, 1858, when the admission of Jews to the House of Commons was under discussion: 151 Hansard, 3rd series, 926, 927. Lord Derby having remarked, "There is no

law to prevent your lordships voting for a member to serve in parliament," Lord Campbell said: "A peer has no right to vote, by the common law of England, for the election of members of the House of Commons." Lord Derby said: "I certainly was of opinion that there was no law to that effect, and that that which alone prevented a peer's vote from being received before the House of Commons was a resolution of the House of Commons itself." To which Lord Campbell replied: "The resolution only declares the common law:" and he subsequently (128 Hansard, 3rd series, at p. 928) added: "In reference to what had been said on the subject of the authority of resolutions passed by either House, he had to observe that the resolutions of neither House of Parliament altered or affected the law of the land. The resolutions of the House of Lords or of the House of Commons affecting to alter the law of the land would in Westminster Hall be regarded as so much waste-paper. It was not by resolution of the House of Commons that peers were prevented from voting for representatives in the House of Commons, but it had been an ancient, immemorial law of England that peers sat in their own right in their own House, and had no privilege whatsoever to vote for members to sit in the other House of Parliament. Since the Reform Bill (2 Wm. 4, c. 45,) passed, peers had frequently sought to register their votes for the election of members of the House of Commons; but the revising barristers had invariably and most properly refused to allow them."

[KEATING, J. The House of Commons, by its committees, undoubtedly could and did reject the votes of peers. And the election judges under the Election Petitions Act, 31 & 32 Vict. c. 125, s. 26 (1), are to be guided by "the principles, practice, and rules on which committees of the House of Commons have heretofore acted."]

There is a subsidiary point in Lord Beauchamp's case, viz. that the revising barrister struck out the name *ex mero motu*.

(1) 31 & 32 Vict. c. 125, s. 26: "Until rules of Court shall have been made in pursuance of this Act, and so far as such rules do not extend, the principles, practice, and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions shall be observed, so far as may be, by the Court and judge in the case of election petitions under this Act."

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[BRETT, J. The revising barrister has to take notice of personal disabilities. (1)]

G. Browne, who appeared for the respondents, referred to *Wilson v. Town Clerk of Salford* (2), where this Court held that a woman, being legally incapacitated from voting, could not be an appellant.

Manisty, Q.C., for Lord Salisbury, after the authorities referred to by Mr. Wills, agreed that it would be vain to argue that a peer has a right to vote in the election of a member of the House of Commons, or to be on the register of voters. The resolution of 1699 and 1700 having been acted upon for so many years without having been successfully questioned, must now be assumed to have been a good and binding declaration of the common law, especially after the provisions contained in s. 26 of the Election Petitions Act, 31 & 32 Vict. c. 125.

H. James, Q.C., for the other respondents, was not called upon.

BOVILL, C.J. From the course which the learned counsel have taken, and properly taken, on the argument of these cases, it seems hardly necessary for us to do more than pronounce a formal judgment for the respondents, the learned counsel for both the appellants agreeing that their claim to vote is untenable. As, however, the matter has been brought before us for decision, it may be expedient to state our reasons. The House of Commons, originally, acting judicially, and committees of the House, in later times, sitting as a Court and acting judicially, had to decide all matters connected with the election of its members. By the Election Petitions Act of 1868, 31 & 32 Vict. c. 125, that duty has been transferred to the election judges. But, prior to the passing of that Act, the House of Commons, by itself or by committees, had the exclusive right to determine the validity of votes given at elections. In the year 1699, when that power was exercised by the House of Commons itself, a resolution was passed on the occasion of an attempt made by the Earl of Manchester to vote at the election of a member for Malden, that "no peer of this kingdom hath any right to give his vote at the election for any member to serve in parliament." It was a resolution not expressing merely the will of the House of Com-

(1) See 6 Vict. c. 18, s. 40.

(2) Law Rep. 4 C. P. 398.

mons, but as to the right of peers to interfere in elections; and that resolution has in substance been repeated in every subsequent session down to the present time. In addition to that, we find in the year 1700 a still stronger resolution to the effect that, "if a peer or lord-lieutenant of a county concerns himself in elections, it is an infringement of the liberties of the Commons." It is not now necessary to enter into the reasons for the exclusion of peers from voting at or interfering in elections for members of the other House: there were, no doubt, constitutional reasons to justify it. These resolutions were passed, not for the purpose of determining who should in future be allowed to vote, but for the purpose of declaring what was the law upon the subject. The House of Commons alone could not, without the assent of the other branch of the legislature, make a law to determine its own constitution: but it was competent to the House, sitting as a Court, as it undoubtedly was, to determine as to the right of voting; and they were bound to declare the law. Acting upon these resolutions, the House of Commons and the election committees have decided in one uniform stream of authorities from that time to the present, that peers have "no right" to vote. It is said, indeed, in Heywood's County Elections, p. 316, that these resolutions never received the assent of the House of Peers; but no instance is to be found of a peer of parliament having been allowed to vote from that time,—a period of more than 170 years. Whenever it has been attempted, the claim has been either given up or expressly negatived. How does the matter stand upon authority? Lord Coke, Chief Baron Comyns, and Blackstone, all concur in saying that no peer of parliament has any right to vote at the election of a member of the House of Commons. All the modern text books lay down the same doctrine; and we find that it has in comparatively recent times received the high sanction of Lords Brougham and Campbell. Not only, therefore, is there an entire absence of authority in favour of the claim, but a considerable body of authority against it. Whenever a peer has voted at an election, upon a scrutiny before the House his vote has invariably been disallowed: after the establishment of election committees, the result has been the same. Independently of s. 26 of 31 & 32 Vict. c. 125, I should

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have no hesitation in holding that a peer of parliament had no right to vote ; though, if the matter had been open to doubt, that section might have had some considerable bearing upon it. The election judges must be governed by the decisions of the election committees, and would in like manner upon a scrutiny strike off the vote. I desire not to be understood as giving any opinion as to the construction which ought to be put upon that section in any other case which may arise under it. Upon the authorities as well as upon principle, I am clearly of opinion that a peer of parliament has no right to vote in the election of members of the House of Commons. The decisions of the revising barristers were right, and the appeals must be dismissed, and, there being nothing to distinguish these from the ordinary case of an unsuccessful appeal, dismissed with costs.

KEATING, J. I am of the same opinion. There seems to be no doubt that the authorities are all one way. In the first place, we find a resolution of the House of Commons declaring the law, which they clearly had a right to do upon this particular point. No one has suggested that the House of Commons has power to make the law ; but, looking at that resolution as a declaration of what the law always had been and then was, it is undoubtedly entitled to the highest respect. It is corroborated by all the earlier authorities, and the practice has been uniform since the making of that resolution. Mr. James has referred me to 8 Hen. 6, c. 7, intituled "What sort of men shall be choosers, and who shall be chosen knights of the parliament," the preamble of which clearly shews that the exclusion of peers from the right of voting was contemplated. There was abundant authority, including that of Lord Coke, to justify the resolution of 1699 : and we find it stamped with the high sanction of Chief Baron Comyns. We have also the authority of Lord Brougham and Lord Campbell in support of it : and, above all, we find it clothed with the strongest of all authority, viz. uninterrupted usage for more than a century and a half ; and no single authority of any weight is to be found the other way. Heywood's statement, traced to its source, viz. the returns found in Prynne, is deserving of no weight. In the course of the argument, I referred to s. 26 of 31 & 32 Vict. c. 125. I

would not, however, be understood as basing my judgment on that section, because, although the word "principles" is a large and comprehensive word, yet, upon a further recollection of what passed in this Court in the *Norwich Case* (1), I find nothing to preclude us from saying that "principles" in that section means nothing more than practice or procedure, and that it does not involve any question as to the right to vote. I therefore wish to guard myself from being supposed to have expressed any opinion upon the subject on this occasion. I entirely agree with my lord in thinking that the decisions of the revising barristers in these cases were right. I would merely desire to add an expression of my entire approval of the course pursued by the learned counsel for the appellants; and to say that I have yet to learn that it is otherwise than the duty of counsel to say so when he finds a point not to be arguable. I have always understood it to be the chief function of the Bar to assist the Court in coming to a just conclusion.

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BRETT, J. I feel extremely reluctant to give any judgment in this case. The course which has been pursued by the counsel for the appellants has placed the Court in great difficulty. I must confess I entertained considerable doubt whether the claim set up could be supported; but I thought it right to make some suggestions for the purpose of ventilating the propositions stated by the learned counsel in admitting that they had no case. I quite agree that it is the duty of counsel to assist the Court by referring to authorities which he knows to be against him. But I cannot help thinking that, when the counsel has satisfied himself that he has no argument to offer in support of his case, it is his duty at once to say so, and to withdraw altogether. The counsel is master of the argument and of the case in court, and should at once retire if he finds it wholly unsustainable, unless indeed he has express instructions to the contrary. With the greatest respect for the two learned counsel who have appeared for the appellants in these cases, I must confess I do not quite approve of the course which they have taken.

Two propositions have been urged, so to speak, in the course of

(1) *Stevens v. Tillet*, Law Rep. 6 C. P. 147.

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the argument,—first, that, as matter of principle, and by the common law, as shewn by almost immemorial usage, peers have not the right to vote; secondly, that, assuming that peers were not by the common law incapacitated from voting in the elections of members for the House of Commons, yet the House of Commons has, by resolutions and by decisions of election committees, held as matter of principle that peers cannot vote, and that this Court, by force of s. 26 of the Parliamentary Elections Act, 1868, is precluded from holding otherwise.

If our decision depended upon the latter proposition, I should have declined to pronounce any opinion. But I may observe that I doubt if that be the true meaning of that section. It evidently refers to procedure only. If “principle” involves a consideration of a man’s right to the franchise, the judges could not have any power to deal with it under s. 26.

The real and only question, however, arises upon the first proposition, viz. that peers have no right to vote by the common law. How is that proposition sought to be sustained? By immemorial usage, and by a series of judicial decisions of the House of Commons before the Grenville Act, 10 Geo. 3, c. 16, and of election committees since that Act. I apprehend that the judicial decisions (as they are admitted to be) of the House and of the committees are entitled to the greatest respect, and are binding upon this Court unless greater authority is brought to bear against them. It may be, however, that the resolution of 1699 was intended as a mere protest, and not as a declaration of what the common law was; and, if so, I should protest against the decisions of the House and of the committees founded thereon being considered as binding upon us. There seems to be some colour for doubting whether that resolution is a judicial decision, because, if it were so, there being no appeal, there could have been no necessity for repeating it at the beginning of every subsequent session, as it has been the practice to do ever since the House of Commons parted with its jurisdiction in this respect, and allowed it to be vested in the election judges. (1) If that were clearly so, I should have thought that it was our duty to hold that the resolution, and the decisions

(1) By 31 & 32 Vict. c. 125.

founded upon it, were not binding on us. But it has been admitted by the counsel who have appeared for the appellants that the resolution of 1699 was a judicial declaration of the common law. After that admission, and the learned counsel having failed, notwithstanding their diligent search, to discover any trace of authority, either before or since the date of that resolution, in favour of the claim, it seems to me that we may fairly say there is strong evidence against it: and therefore I am prepared to hold that, independently of the resolution, we are justified by the current of decisions in holding that peers have no right to vote. If they have no right to vote, they can have no right to be upon the register. For that reason, and for that reason only, I concur in the judgment of the Court affirming the decisions of the revising barristers.

GROVE, J. I am of the same opinion. It is a difficult task to pronounce a judicial decision in a case where one side only of an argument has been heard, and therefore I abstain from going into my reasons for concurring in this judgment. The total absence of authority in favour of the claim, and the concessions made by the counsel for the appellants, abundantly justify the conclusion at which we have arrived, quite irrespectively of the constitutional reasons which might be advanced in opposition to the claim.

Decisions affirmed.

Attorneys for Lord Beauchamp: *Young, Maples, Teasdale, Nelson, & Co.*

Attorneys for Marquis of Salisbury: *Nicholson & Herbert.*

Attorneys for respondents: *Wyatt, Hoskins, & Hooker.*

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COOKE, APPELLANT; BUTLER, RESPONDENT.

— *Parliament—County Vote—12l. Occupier—"Rateable Value"—Representation of the People Act, 1867 (30 & 31 Vict. c. 102), subs. 2.*

The "rateable value" of the premises required by s. 6, subs. 2, of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), means the real "rateable value," and not the rateable value on the rate-book; and the revising barrister may therefore go into the question, and decide what the real rateable value is.

APPEAL from the revising barrister for the county of Bedford.

John Hubbard claimed to have his name inserted in the list of persons entitled to vote as being the occupying tenant of lands and tenements within the parish of Luton of the rateable value of 12l. or upwards.

It was proved or admitted that Hubbard occupied the premises in question at an annual rent of 14l., which it was proved was a fair rent; that he was the occupier thereof on the 31st of July last, and had been such occupier for twelve months immediately preceding; that he had been duly rated, and had paid all poor-rates in respect of the premises; and that the premises were in an improving neighbourhood. It was also admitted that the premises of Hubbard were not rated at a lower amount than similar premises occupied by other persons in the parish.

It appeared from the rate-book that the gross estimated rental of the premises was stated to be 14l. 9s., and the rateable value 11l. 12s. 6d.

It was objected by the appellant, that, inasmuch as the premises were stated in the poor-rate book to be of the rateable value of 11l. 12s. 6d. only, and Hubbard had paid rates upon that assessment, he was not entitled to be registered as a voter in respect thereof.

The revising barrister held that the property was of the real rateable value of 12l., and allowed the claim, and inserted the name of Hubbard upon the list.

J. E. Gorst, for the appellant. To entitle a man to the county

franchise in respect of the occupation of premises as owner or tenant, s. 6, subs. 2, of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), requires that the premises shall be of the "rateable value of 12*l.* or upwards." It has been matter of controversy whether that means rateable value in point of fact or rateable value as stated in the rate-book. Several of the revising barristers have held the rate-book to be conclusive, and have refused to receive any other evidence of value.

[BRETT, J. In ascertaining the 10*l.* value under s. 27 of the Reform Act (2 Wm. 4, c. 45), the entry of value in the rate-book was always considered immaterial. The question is whether "rateable value" in this Act is to be dealt with as "value" was under that Act.]

In s. 27 the words are, "the clear yearly value," and the rateable value is immaterial. Unless the rate-book is to be final for the purpose of determining the rateable value, the value will be questioned in every case.

[DENMAN, J. No assistance is derived from the interpretation clause, s. 61. Mr. Davis (1) suggests that it would have been better to have said "the rateable value as appearing on the rate," and that that would probably be the interpretation put upon the words.]

The present case was stated for the purpose of obtaining the opinion of the Court on the subject.

Bulwer, Q.C., for the respondent, was not heard.

BOVILL, C.J. I am of opinion that this case was correctly decided by the revising barrister. The words of s. 6 of the Representation of the People Act, 1867, are that every man shall be entitled to be registered as a voter for a county who, amongst other things, is the occupier, as owner or tenant, of lands, &c., within the county of the "rateable value of 12*l.*" or upwards. There is an obvious difference between that and the expression "rated at 12*l.*" And the revising barrister has put what I conceive, notwithstanding the suggestion of Mr. Davis, to be the proper construction on the words used by the legislature. The rateable value is not con-

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(1) Davis on Registration, p. 231.

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clusively determined by that which appears on the rate-book. The appeal must be dismissed, with costs.

BRETT, J. I am of the same opinion. Sect. 6, subs. 2, says that the premises, to give a qualification, must be of the "rateable value" of 12*l.* or upwards. The question is whether that means the real rateable value or the value which the overseers have thought fit to insert in the rate, which must be for the purpose of argument assumed not to be the true rateable value. I think we cannot hold the words in that part of the section to mean "*rated at 12*l.**," which is the word used in the next subsection. It seems to me that it would be contrary to every canon of interpretation to say that "of the rateable value of 12*l.*" means the same as "*rated at 12*l.**" I entirely dissent from the suggestion made by Mr. Davis in the note referred to. The right of voting would, if that were adopted, depend not upon the rateable value of the premises, but upon the views of the overseers; and such a construction might have the effect of disfranchising a large number of people.

GROVE and DENMAN, JJ., concurred.

Decision affirmed.

Attorney for appellant: *Albert Saunders, for Whyley & Piper, Bedford.*

Attorneys for respondent: *Williams & James, for Wilkinson, Butler, & Wilkinson, St. Neot's.*

LITTLE, APPELLANT; THE OVERSEERS OF PENRITH, RESPONDENTS.

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Nov. 15.

Parliament—County Vote—12l. Occupier—Rating—Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 6, subs. 3—Registration Acts, 6 Vict. c. 18, s. 75, and 31 & 32 Vict. c. 58, s. 30.

The name of "N. A." had for several years appeared in the rate-book as the occupier of a house and shop wherein he carried on business. Upon his taking his two sons G. A. and T. B. A. into partnership, the overseers at his request altered the rating to "N. A. & Sons," the name under which the business was thenceforth to be carried on. N. A. had retired from the concern some years, but G. A. and T. B. A. still occupied the premises and carried on the business under the style of "N. A. & Sons," and were called upon to pay and paid the rates; on the rate-book the name of "N. A. & Sons" still appeared as "occupiers:"—

Held, that G. A. and T. B. A. were rated within 30 & 31 Vict. c. 102, s. 6, subs. 3, the insufficiency or inaccuracy of description, if any, being cured by s. 75 of 6 Vict. c. 18, and s. 30 of 31 & 32 Vict. c. 58; and they were therefore entitled to a vote for the county as 12l. occupiers.

APPEAL from the revising barrister for the eastern division of the county of Cumberland.

Objection was made to the name of George Arnison upon the list of voters for the parish of Penrith.

The name of George Arnison appeared on the "List of Voters as occupiers of rateable value of 12l.," as "joint occupier of house and shop of the rateable value of 80l. and upwards."

George Arnison had a right to have his name retained upon the list, provided the Court should be of opinion that he was duly rated in respect of the premises occupied by him, within the meaning of 30 & 31 Vict. c. 102, s. 6, subs. 3.

The premises in question were described in the rate-book, as follows:—Name of occupier,—“N. Arnison & Sons;” Name of owner,—“Nathan Arnison.”

“N. Arnison” means Nathan Arnison. He is alive, and was formerly the sole occupier of the premises, where he carried on the business of a draper. He subsequently took two of his sons, the voter, George Arnison, and Thomas Bell Arnison, into partnership; and the business was carried on under the name of “N. Arnison & Sons.” Nathan Arnison retired from business some years ago; and ever since his retirement, the business has been carried on by

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the above-mentioned two sons, under the name of "N. Arnison & Sons." The two sons are now the sole occupiers of the premises. Nathan Arnison has three other sons; but they do not occupy the premises, nor do they carry on business with the two above mentioned.

For the last few years, when the rates have been called for they have been paid by one or other of the two, George Arnison or Thomas Bell Arnison, and a receipt given for them as received from "N. Arnison & Sons."

With the consent of both parties, the revising barrister received the statement of one of the overseers, to the following effect, viz. that, when he came into office fifteen years ago, "N. Arnison" was solely rated for the premises in question; that, about seven years ago, N. Arnison requested him to alter the rating to "N. Arnison & Sons," but gave no names; and that the rating had remained "N. Arnison & Sons" ever since.

The revising barrister decided that, as George Arnison and Thomas Bell Arnison were not named in the rate otherwise than as appears above, they were not duly rated in respect of the premises occupied by them, within the meaning of 30 & 31 Vict. c. 102, s. 6, subs. 3; and he accordingly expunged the name of George Arnison from the list.

Campbell Forster for the appellant. George Arnison and Thomas Bell Arnison, though not actually named in the rate, were rated in respect of the premises in question, within the meaning of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 6, subs. 3, so as to entitle them to be registered. It was sufficient to describe them by the name of the firm under which they traded; and, at all events, if that description was insufficient or inaccurate, such insufficiency or inaccuracy of description was cured by s. 75 of 6 Vict. c. 18, which enacts that, "where any person shall have occupied such premises as in the said recited Act (2 Wm. 4, c. 45, s. 27) are mentioned for twelve calendar months next previous to the last day of July in any year, and such person, being the person liable to be rated for such premises, shall have been bonâ fide called upon to pay in respect of such premises all rates made for the relief of the poor in such parish or

township during the time of such his occupation so required as aforesaid, and such person shall have bonâ fide paid on or before the 20th of July in such year all sums of money which he shall have been called upon to pay as rates in respect of such premises for one year previously to [5th day of January] then next preceding, such person shall be considered as having been rated and paid all rates in respect of such premises within the meaning of the said recited Act, and be entitled to be registered in respect of the same in any year, any misnomer or inaccurate or insufficient description in any rate of the person so occupying, or of the premises occupied, notwithstanding." And this enactment, which related to borough votes, is, by s. 30 of the Registration Act, 1868 (31 & 32 Vict. c. 58), made applicable to the new county franchise created by the Representation of the People Act, 1867, s. 6. Here G. Arnison and T. B. Arnison were the persons, and the only persons, liable to be rated in respect of these premises, and they were bonâ fide called upon to pay and have bonâ fide paid the rates. In *Moss v. Lichfield* (1), the person claiming to be registered had paid the rate without being rated and without having been called upon to pay it; and Erle, J., said, "The real question is whether the party was intended to be rated." That these two persons were intended to be rated is clear from the statements in the case as to what passed between Nathan Arnison, the father, and the overseer, when the form of the entry in the rate-book was changed to the name of the firm.

[KEATING, J. There can be no doubt as to the father's intention. The question is what was the intention of the overseers.]

Calling upon the sons to pay the rate was evidence of an intention on the overseers' part to rate them.

The respondents did not appear.

BOVILL, C.J. George Arnison was the occupier of the premises in question, together with his brother, Thomas Bell Arnison. The two carried on business there under the name of "N. Arnison & Sons." There was in fact no "N." (or Nathan) Arnison occupying the premises or carrying on business there,—the two sons, upon the retirement of their father, succeeding to the business and

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continuing to carry it on for their own benefit under the old name. The question is whether the two sons so occupying the premises are rated, within 30 & 31 Vict. c. 102, s. 6, subs. 3. I cannot doubt from what is stated in the case that the overseers intended to rate the persons carrying on the business under that firm and occupying the premises. The two persons so occupying have been called upon to pay and have *bonâ fide* paid the rates. Under the style of "Coutts & Co.," or "Child & Co.," no one would doubt that it was intended to rate the members of those respective firms, even though the overseers should happen to be ignorant of the names of all of them. The persons intended to be described here under the description of "N. Arnison & Sons," clearly are the persons who now carry on the business upon the premises under that firm. In the report of *Moss v. Lichfield*, in the Law Journal (1), I find the following observation by Erle, J.: "If a partnership firm is charged in the rate, each partner is intended to be charged." I cannot for a moment doubt that the two sons in this case were intended to be and were rated. The case is clearly within s. 75 of 6 Vict. c. 18, and in my opinion the decision of the revising barrister was wrong, and must be reversed.

KEATING, J. I am of the same opinion. I must confess I have felt some doubt during the discussion of this case; but upon the whole I think it falls within s. 75 of 6 Vict. c. 18. Nathan Arnison, the father, originally occupied and carried on business upon the premises in question. Having taken his two sons, G. Arnison and T. B. Arnison, into partnership with him, about seven years ago, Nathan went to the overseer and requested him to alter the rating to "N. Arnison & Sons," but gave no names; and the rating has ever since stood as "N. Arnison & Sons," which is the name under which the two sons now occupy the premises and carry on the business. The overseer says that no names were mentioned; but it appears that, after the retirement of the father from the firm, the two existing partners, who then became the only occupiers of the premises, were called upon to pay and did pay all rates. I think there was sufficient ground for saying that the overseers intended to rate and did rate the occupiers. I do

(1) 14 L. J. (C.P.) at p. 57.

not say that this was a strictly accurate description of the persons rated; nor is it necessary to say how far the rate could be enforced against the two sons. But I think the 75th section of the Act referred to was intended to apply to a case like this, where the description is not precisely accurate.

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BRETT, J. By s. 6, subs. 3, of 30 & 31 Vict. c. 102, no man is entitled to be registered for a county in respect of the 12 $\frac{1}{2}$ occupation franchise, unless he "has during the time of such occupation been rated in respect of the premises so occupied by him to all rates (if any) made for the relief of the poor in respect of the said premises." In the rate in question the description of the persons rated is "N. Arnison & Sons;" and the question is whether that is sufficient to shew that G. Arnison and T. B. Arnison were rated. It certainly cannot be said that it is an "accurate description" of those two persons; but it was contended on their behalf that the inaccuracy was cured by s. 75 of 6 Vict. c. 18, which is made applicable to the occupation franchise for counties by s. 30 of 31 & 32 Vict. c. 58. The question, therefore, is, whether the case comes within s. 75. The section is somewhat singularly drawn. The earlier portion of this branch of the enactment,—“where any person shall have occupied, &c., and such person, being the person liable to be rated for such premises, shall have been bonâ fide called upon to pay in respect of such premises all rates made for the relief of the poor, &c., and such person shall have bonâ fide paid, on, &c., all sums of money which he shall have been called upon to pay as rates in respect of such premises,” &c.,—would seem to be applicable whether the party was rated at all or not. Then it goes on: “such person shall be considered as having been rated and paid all rates in respect of such premises within the meaning of the recited Act, and be entitled to be registered in respect of the same in any year, any misnomer or inaccurate or insufficient description in any rate of the person so occupying or of the premises occupied notwithstanding.” That seems to assume that there is *some* description of the occupier and of the premises occupied on the rate, but an insufficient or inaccurate one; but it assumes that the person so inaccurately described was intended to be rated. It follows, therefore, that it is neces-

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sary to shew that he was in point of fact rated, and that there was an attempt to describe him on the rate. That reduces the question to this, whether it is shewn here that G. Arnison and T. B. Arnison were intended to be rated, and whether there was an attempt to describe them on the rate. Now, the facts disclosed by the case are these: Nathan Arnison, the father, was originally rated, and properly described on the rate. Having taken his two sons into partnership, he went to one of the overseers and asked him to alter the entry to "N. Arnison & Sons." That request could have no meaning unless the father intended to have his two sons put on the rate. But the material thing to be shewn is, that he made that intention known to the overseer, and that the overseer adopted it. The case does not shew that anything farther was communicated to the overseer at that time: but the rating was altered pursuant to the father's request, and ever since the retirement of the father from the firm the sons have been called upon to pay and have paid all rates. I think these facts are sufficient to warrant the Court in inferring that the overseers did intend to rate any sons of Nathan Arnison who were members of the firm, and that there was a sufficient rating. If so, the only remaining question is whether George Arnison and Thomas Bell Arnison are sufficiently described in the rate. It seems to me that "N. Arnison & Sons" was a description of those two persons, if the overseers intended to rate them, and that it was an inaccurate description within the healing powers of s. 75 of 6 Vict. c. 18, and consequently that George Arnison and T. B. Arnison were entitled to be registered. The point taken by the revising barrister was, that, as the sons were not *named* in the rate, they were not duly rated within the Representation of the People Act, 1867. But I think that, as they were intended to be described under the name of the firm, the revising barrister was wrong in holding that the provision in the former Act did not cure the inaccuracy of description.

GROVE, J. I agree with the rest of the Court that the decision of the revising barrister must be reversed, although I must confess that I have entertained some doubt, and should have been better satisfied if the respondents had been represented

on the argument. My doubt was mainly whether the words "insufficient or inaccurate description" could apply where there is no description at all. But, upon reflection, I think there is some description here. The persons intended to be rated are virtually described as sons of N. Arnison. Then the 75th section of 6 Vict. c. 18 provides that, where a person has been bonâ fide called upon to pay and has bonâ fide paid the rates, he shall be considered as having been rated and paid all rates, within the meaning of s. 27 of the Reform Act, notwithstanding "any misnomer or inaccurate or insufficient description" of him in the rate. I think the facts bring this case within that section. I forbear to express any opinion as to the proper mode of rating persons who trade under a firm. Nor do I think the intention of the overseer should be the sole guide. But, upon the whole, I think there was a description here, though an insufficient one, of the persons rated.

Decision reversed.

Attorneys for appellant: *Johnston & Co.*

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BESWICK, APPELLANT; ALKER, RESPONDENT.

Nov. 13.

Parliament—County Vote—Severance of Qualification under 2 Wm. 4, c. 45, s. 24—Freehold Land and Pew Rents.

The respondent was placed on the register of voters for a county in respect of "Freehold Land and Pew Rents, St. Mary's Church," which was situate in a borough. He was minister of that church, and as such occupied the parsonage house, and was entitled, in respect of the house, to a vote for the borough. His stipend as minister was "the residue of pew-rents" after certain payments made thereout by the churchwardens:—

Held,—upon a case which reserved only the question whether the pew-rents could, notwithstanding 2 Wm. 4, c. 45, s. 24, be severed from the occupation of the house (which was part of the benefice), so as to give a separate qualification for the county,—that there was nothing in that section to prevent them from being so severed, and consequently that the respondent was entitled to have his name retained upon the county register.

APPEAL from the revising barrister for the north-western division of Lancashire.

The appellant objected to the name of the respondent being

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retained on the list of persons entitled to vote in the election of members of parliament in respect of property situate in the township of Preston.

The qualification of the respondent appeared on the register as follows:—"Alker, George; Lisbon Hall, Fishwick; Freehold land and pew-rents; St. Mary's Church, St. Mary's Street."

The respondent is minister of St. Mary's Church, which is situate within the parliamentary borough of Preston. No profit has accrued to him, or is likely to accrue, from the land; but, under the "sentence of consecration" of the church, he is entitled to the rents of certain pews and sittings which are let by the churchwardens according to a certain scale, which scale the churchwardens for the time being may, with the consent of the bishop, alter from time to time as occasion may require; and, after deducting yearly two several sums of 8*l.* 15*s.* and 5*l.* for the services of the church, the churchwardens pay the residue of such pew-rents to the minister for the time being of the said church, to be received by him for his own absolute use and benefit, by way of stipend. The sum which the respondent has so received from the above pew-rents has always exceeded 100*l.* in the year.

The house mentioned in the register as the respondent's place of abode is the parsonage-house of the minister of St. Mary's; and the respondent occupies and is rated for it, and in respect of it has acquired the right to vote for the borough of Preston.

It was objected that the house was a part of his benefice, which benefice could not be divided so that any part of it could confer on the respondent the right to vote for the county, and therefore his name should be expunged from the register.

The revising barrister decided that the respondent was entitled to have his name retained on the register.

L. Temple, Q.C., for the appellant. The only question is, whether the parsonage house and the pew-rents necessarily constitute one occupation, so as, by the operation of s. 24 of the Reform Act, 2 Wm. 4, c. 45, to prevent them from being severed for the purpose of the franchise. That section enacts that "no person shall be entitled to vote" for a county "in respect of his estate or interest as a freeholder in any house, warehouse, counting-house,

shop, or other building occupied by himself, or in any land occupied by himself together with any house, warehouse, counting-house, shop, or other building being, either separately or jointly with the land so occupied therewith, of such value as would according to the provisions hereinafter contained confer on him the right of voting for any city or borough, whether he shall or shall not have actually acquired the right to vote for such city or borough in respect thereof." The claimant is in receipt of the pew-rents, as well as in the occupation of the parsonage house, as minister of the church; consequently, there is such a unity of title and possession as to bring the case within that section.

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[BOVILL, C.J. Sect. 24 relates only to *land* occupied with a house or other building. Could the pew-rents be added to the house here so as to make up the 10*l.*, value for a borough qualification?]

The pew-rents arise out of land; and the claimant holds them with the house.

[BRETT, J. If he is entitled to be registered in respect of the pew-rents, it is because he is in possession of the freehold of the church.

BOVILL, C.J. We are not told how the pew-rents give the claimant a qualification. It may be that he receives them by virtue of some Act of Parliament. Upon the case as presented to us, we must assume that they are such as to constitute a qualification for a county vote.]

The general law gives the minister the possession of and control over the pews.

[BOVILL, C.J. The common law certainly gives him no such possession or control.]

Capell v. Aston (1) and *Burton v. Aston* (2) were referred to.

J. E. Gorst, for the respondent, was not called upon.

BOVILL, C.J. The question presented to us in this case is not as to the right of the respondent to be registered for the county in respect of the qualification described. The only objection taken before the revising barrister was that the house and the pew-rents together constituted the benefice, and could not, by reason of s. 24

(1) 8 C. B. 1.

(2) 8 C. B. 7.

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of the Reform Act, be severed, so as to give the respondent a vote for the borough in respect of the house and a vote for the county in respect of the pew-rents. That is the sole question which is open to us upon this case; and upon the facts stated I am of opinion that the case is not brought within the section. There is nothing to shew that the respondent was in the occupation of any land. A right to receive pew-rents is not an occupation of land. (1) What is the nature of the pew-rents, or how they constitute a qualification, is not now before us: the only question is whether or not the case is brought within s. 24. I am of opinion that it is not, and consequently that the decision of the revising barrister must be affirmed.

BRETT, J. With the scanty information we have, it must be taken that the claimant has such a freehold interest in these pew-rents as would entitle him to a vote for the county, but for the objection put forward by the appellant. His claim is, not in respect of the occupation but of the ownership of the pew-rents. He is in the occupation of and is rated for the house, and has a right to vote for the borough in respect of it. He claims to be registered for the county in respect of a freehold interest in pew-rents. The only way in which we can hold him to be possessed of that right is by assuming that some Act of Parliament has vested in him a freehold interest in the church which is measured by his interest in the pew-rents. Let us then assume that he has a clear freehold interest in the church, and that he occupies the parsonage house. How does that bring the case within s. 24? That section enacts that no person shall vote in respect of his estate or interest as a freeholder in any house, &c., occupied by himself, or in any land occupied by himself together with any house, &c., being either separately or jointly with the land so occupied therewith of such value as would confer a vote for any city or borough. There is no statement here that the respondent occupies the church. His claim is in respect of a freehold interest. It is said that the two,—the house and the pew-rents,—are occupied in respect of the same title. But, upon the facts found here, the claimant can vote for the borough only in

(1) See *Hinde v. Chorlton*, Law Rep. 5 C. P. 224; and *Greenway v. Hocker*, Law Rep. 5 C. P. 235.
2 C. P. 104; see also *Brumfitt v. Ro-*

respect of his occupation of the house. His claim to vote for the county is in respect of another and a different qualification. It is precisely the same as if he were the owner of several houses in the borough, occupying one and letting the others. He would have a vote for the borough in respect of the former (the value being sufficient), and for the county in respect of the latter.

GROVE and DENMAN, JJ., concurred.

Decision affirmed.

Attorneys for appellant: *Griffith & Brownlow, for Helston & Co., Preston.*

Attorneys for respondent: *Kimber & Ellis.*

SIMEY, APPELLANT; MARSHALL, RESPONDENT.

Nov. 15.

Parliament—County Vote—Inmate of a Charitable Foundation—Equitable Estate—Rent-charge—Free Land or Tenement—8 Hen. 6, c. 7.

By a charter of incorporation and an Act of Parliament, the inmates of the "Hospital of King James at Gateshead" were to consist of a master, three "antient brethren," and (by additions from time to time made) twenty-three "younger brethren," the latter forming no part of the corporation. The brethren, whose appointments were for life, were subject to certain rules, and were removeable (though none had ever been removed) for certain misconduct.

The estates of the hospital, which were originally granted to "the master and brethren and their successors in free, pure, and perpetual frankalmoign for ever," were under the management of the master, who, after payment of land and income-tax, tithes, repairs, and other outgoings, was to appropriate to his own use one-third of the net proceeds, and pay 25*l.* a year to each of the three antient brethren, and 40*l.* (afterwards increased to 70*l.*) a year to the chaplain, and to reserve in his hands a balance not exceeding 60*l.* to meet current expenses, and to divide the residue among the younger brethren in equal shares, yet so nevertheless that no younger brother should take under such division more than 25*l.* The number of younger brethren had never been increased so as to reduce their respective shares below 24*l.* per annum. None of the brethren actually occupied any part of the hospital property :—

Held, that the "younger brethren" had neither a legal nor equitable estate in the lands and tenements belonging to the hospital; nor a rent-charge thereon; and were therefore not entitled to a county vote.

APPEAL from the revising barrister for the northern division of the county of Durham.

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James Shafto objected to the claim of James Bennett to be registered in respect of "Freehold land, freehold coal-mines, freehold rent-charges, or ground rent," situate in Gateshead. The following facts were established by the evidence:—

1. The hospital of King James, in Gateshead, has existed from time immemorial. Its founder is unknown; and the foundation charter has long been lost.

2. By a re-foundation charter, dated the 4th of January, 1610, King James I. incorporated the hospital, which then consisted of one master and three brethren, by the title of "The Hospital of King James at Gateshead." The charter provided that the rector of Gateshead should for ever be the master of the hospital; that there should be three poor and needy men, bachelors or widowers, advanced in life, sustained, maintained, and relieved in the hospital, who should be called "the brethren," and should remain, be sustained, and relieved during their natural lives. The charter further provided, when and so often as it should happen that any of the brethren should die or be removed from the hospital for any cause prescribed by the ordinances, provisions, and constitutions of the hospital, or in any other manner whatsoever should be removed from the hospital, or should withdraw of his own accord, that then the master should within fourteen days nominate and place in actual possession any other fit person. The charter further provided that the Bishop of Durham and his successors should from time to time revise the antient statutes, laws, ordinances, and constitutions of the hospital, and make such good, fit, and wholesome statutes in writing concerning the government and direction of the master and brethren as should not be contrary or repugnant to law. And by the charter, the hospital, with the garden and other lands (the greater part of which still belong to the hospital) were granted to the master and brethren and their successors, To have, hold, and enjoy the same to the sole and proper benefit and use of the master and brethren and their successors, in free, pure, and perpetual frankalmoign for ever. It was also provided that, after the death of the then master, his successors should have and enjoy for their own use and benefit one full third part of the rents, revenues, and profits of all and singular the lands, tenements, and hereditaments thereby granted to the hospital, and the

brethren and their successors should have and enjoy for their own use and maintenance the other two parts of such rents, revenues, and profits.

3. An Act of Parliament was passed in 1811 (51 Geo. 3, c. cxvi.) for enabling the master and brethren of the hospital to grant leases, and to enable the Bishop of Durham to make statutes and ordinances for the government of the hospital. This Act recited the re-foundation charter, and that the master and brethren were seised of certain lands in Gateshead which are specified in the schedule thereto, and that the Bishop of Durham was the patron of the mastership of the hospital as annexed to the rectory of Gateshead, and that the master of the hospital had the appointment of the brethren in case of vacancy. It also recited that no statutes or ordinances of any kind were then known, and that in respect thereof the estate of the hospital was capable of considerable improvement; that it was also expedient that statutes should be made for the government of the hospital, and that the benefits of the hospital should be extended to a greater number of poor aged men, in furtherance of the benevolent intentions of the founder thereof. The Act then, after giving a power of leasing to the master and brethren, proceeded to enact that the Bishop of Durham might from time to time, by writing under his hand, make and establish such good, convenient, and wholesome statutes, laws, ordinances, and constitutions, as well concerning the Divine service to be performed in the hospital, and the allowance to be made for the same, as well touching the government and direction of the master and brethren, and providing for the repairs of the estate of the hospital, as also for increasing the number of the poor and aged brethren; and such statutes, laws, ordinances, and constitutions from time to time to revise, alter, and amend, so as the same be not contrary either to the laws of the realm, or to the charter, except as to the increase of the number of the brethren. And it further enacted that all such brethren as should be from time to time added as aforesaid should be named, appointed, and admitted, and from time to time for ever be filled up in the same manner as is prescribed by the charter for naming, appointing, and admitting the three antient brethren; and all such additional brethren should be called the "younger brethren," and should not be deemed or

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taken to constitute any part of the said body corporate: provided that nothing in the Act should authorize the making of any statute which should reduce or lessen the income of the then present master and three brethren from the rents and profits of the estates belonging to the hospital, but that they should during their lives receive for their shares of the future rents and profits of the estates as much as they then actually received from such rents and profits; and that the shares of the younger brethren should always be less than the shares of the master and three antient brethren.

4. The schedule to this Act included the whole of the lands which still belong to the hospital, and in respect of which the younger brethren claim to vote.

5. On the 17th of October, 1811, Shute Barrington, Bishop of Durham, made certain statutes and ordinances under the power contained in the Act of Parliament, by which it is ordered, amongst other things, that in addition to the three antient brethren who together with the master then constituted the corporate body, there should be ten younger brethren who should be entitled to the advantages after mentioned; that no person should be capable of being appointed younger brethren except single men of the age of fifty-six and upwards, not possessing more means than 20*l.* per annum, of unexceptionable life and conversation, regular attenders of the Church of England, and frequenters of the Holy Sacrament; that the brethren should attend Divine service regularly when opportunity offered, and should be sober, discreet, and regular in life and conversation; that, in case of one or more of the brethren being guilty of drunkenness or any other immorality, the master should certify the same to the bishop, who should proceed, either by himself or by the archdeacon of Durham, or by other clergymen of the diocese, to examine into the circumstances of the case, and should either remove him from the hospital or subject him to such lesser punishment as he should think fit; that the brethren should from time to time be appointed by the master; that such younger brethren as should reside within a convenient distance of the chapel should have proper seats prepared and set apart for their accommodation, and should regularly attend Divine service, except when prevented by illness or other lawful impediment admitted by the master; that, for performance of Divine service and preaching in

the chapel, a clergyman should be appointed by the master, with the approbation of the bishop; that the estates of the hospital should be under the direction and management of the master, who should receive and take account of the revenues thereof, and should in the first place pay thereout the land-tax, income-tax, tithes, repairs, and all other outgoings affecting the same, and, after that was done, the master should carry one third part of the net rents and revenues of the hospital estates to his own account, and should then pay 25% to each of the three antient brethren, and 70% to the chaplain for his salary; and, after making those payments, the master should, on the 24th of December in every year, divide the residue of the said net rents and revenues between the younger brethren of the hospital in equal shares and proportions, yet so, nevertheless, that no younger brother should take under such division more than 25%, the sum directed to be paid to each of the antient brethren.

6. On the 9th of October, 1849, Edward Maltby, Bishop of Durham, made further statutes under the Act of Parliament, by which it was ordained, amongst other things, that to the ten younger brethren ordered to be appointed by the statutes of 1811 should be added two more as soon as the funds should admit; that the master should have power from time to time to advance to the younger brethren such sums as the state of the revenues might appear to him to allow; and that he should, on or before the 25th of March in each year, distribute the surplus among them, reserving a balance in his hands not exceeding 60%, to meet the current expenses; provided that the shares of the younger brethren should always be less than the shares of the master and the three antient brethren.

7. By a statute made on the 8th of October, 1867, by Charles Baring, Bishop of Durham, four more younger brethren were added to the twelve theretofore existing: and by another statute of the same bishop, made on the 2nd of April, 1869, other younger brethren were added. A subsequent statute of the same bishop has since added one other younger brother,—the total number at the present time being thus twenty-three.

8. The claimant, James Bennett, and twenty-two other persons have been duly appointed and now are the younger brethren of the

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hospital. There is no written form of appointment of a younger brother, such appointment being made by the master entering his name and the date of his appointment in the roll kept by him.

9. No instance of the dismissal of a brother has ever been known.

10. The number of younger brethren has never been increased so as to reduce their respective shares below 24*l.* per annum ; and in fact the share of each younger brother of net rents and revenues of the hospital estates has, ever since the Act of 1811, amounted to upwards of 24*l.* per annum, which sum, as well as the chaplain's stipend of 70*l.* per annum, has been regularly paid to them by the master.

11. There is no hospital building at present in existence ; and neither chaplain nor any of the brethren actually occupy any part of the property belonging to the hospital.

12. It was contended for the objector that the amount of the annual payments to the claimant would never exceed 25*l.*, and might be less if the bishop should think fit to increase the number of younger brethren ; that the claimant, together with the other younger brethren, was not entitled to the surplus of the lands and tenements in question, or of the rents and profits thereof, after providing for the one third share of the master, the payments to the antient brethren, and the chaplain's salary ; but that, after deducting the master's share, and paying the 25*l.* a piece to the three antient brethren, the chaplain's salary, and the claimant and the other younger brethren the 25*l.* or such lesser sum as for the time being they should be entitled to, the surplus of the rents and profits must be set aside for any additional younger brethren that might be appointed ; and that, consequently, the claimant could not be considered a part-owner of the said lands and tenements, or as having an estate at law or in equity therein. It was also contended that the sum payable to the claimant was not a rent-charge, both because it was of uncertain amount and liable to be varied, and because such sum was not a charge upon the said lands and tenements.

13. On the other hand it was contended for the claimant that, inasmuch as the whole surplus of the rents and profits of the lands and tenements, after deducting the master's third part, and the

payments to the antient brethren, and the chaplain's salary, must be divided among a certain class, viz. the younger brethren, of which class the claimant was one, the circumstance of the number of such class being liable to be increased, and possibly the payment to each person of that class being liable to be diminished, did not prevent the whole class, although varying from time to time, from being equitable owners of and having an equitable estate in the said lands and tenements; that, as the present amount of the payments to each younger brother was above 5*l.* a year, he was entitled, as having an equitable estate for life in the lands and tenements, to be registered as a voter: also that, if not having such equitable estate in the said lands and tenements, the claimant had a rent-charge, or such an interest in the nature of a rent-charge in the said lands and tenements as to entitle him to be registered as a voter.

14. The revising barrister was of opinion that, inasmuch as the claimant and the other younger brethren were not necessarily entitled to the whole surplus (after paying the antient brethren and the chaplain the sums aforesaid) of the net two thirds of the rents and revenues of the hospital estates, but were only each entitled to receive thereout an annual payment never exceeding 25*l.* per annum, they had not an equitable estate in the said lands and tenements. He was also of opinion that the amount of the payments to the claimant, not being a fixed or certain charge upon the said lands and premises, was not a rent-charge. He therefore struck the claimant's name out of the list.

If the Court should be of opinion that the claimant was entitled to be registered as a voter either as the owner of an equitable estate in the lands and tenements, or as being entitled to a rent-charge of the requisite amount issuing out of the same, then the claimant's name was to be restored.

H. Shield, for the appellant. Two questions arise in this case,—first, whether the claimant was qualified under the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 5,—secondly, whether he was qualified as the owner of “free land or tenement” to the value of 40*s.* by the year. First, the claimant is seised of an equitable estate for life in lands of the clear yearly value of not

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less than 5*l.* above all charges. By the charter of 1610, the lands belonging to the hospital were vested in the master and brethren and their successors, "to the sole and proper benefit and use of the master and brethren and their successors, in free, pure, and perpetual frankalmoign for ever." Then came the Act of 1811 (51 Geo. 3, c. cxvi.), which provided for the appointment of additional brethren. By certain statutes made under that Act, ten additional or "younger" brethren were appointed; and it was provided that the estates of the hospital should be under the direction and management of the master, who, after making certain payments thereout, should dispose of the residue amongst the younger brethren in equal shares, so that none should take more than 25*l.* per annum. These statutes, operating upon the then state of things, amount to a trust in favour of the claimant and the other younger brethren. There is no hospital building, so that there is no claim in respect of any certain rooms from the occupation of which the parties might be shifted. The only claim is in respect of an estate in the land. Nor does any question arise here as to the eleemosynary character of this foundation. Each of the twenty-three younger brethren has an interest to the extent of a twenty-third part of the net surplus of the proceeds of the estates, after providing for the payments mentioned in the statutes of 1811.

[BOVILL, C.J. What estate has he?]

An equitable estate for life as tenant in common.

[KEATING, J. With the antient brethren?]

No. They are a corporation, and have the legal estate. The younger brethren have an equitable estate, subject to a charge in favour of the chaplain and the antient brethren.

[BOVILL, C.J. Are the corporation trustees of the estates or of the surplus funds?]

They hold the estates as trustees for themselves and the younger brethren.

[BRETT, J. That cannot be; for, in that case they must have an equitable estate in the land, which they clearly have not.

KEATING, J. *Steele v. Bosworth* (1) shews that the claimants are entitled to a mere money payment, and are not possessed of

(1) 18 C. B. (N.S.) 22; 34 L. J. (C.P.) 57.

any equitable freehold estate or interest in the lands vested in the master and ancient brethren, so as to entitle them to be registered.]

There was no disposition of the surplus there. In *Roberts v. Percival* (1), the facts were these:—Burleigh Hospital, a charitable foundation for a certain number of poor men called bedesmen, was governed by certain rules or ordinances which referred to “the feoffees and their heirs,” who by lapse of time had been lost sight of. The bedesmen were appointed for life, each on his appointment having a room in the hospital specially assigned to him, and which was found to be of the annual value of 4*l*. The bedesmen were by the ordinances declared to be subject to expulsion for certain offences; but no instance of expulsion had ever been known. There was a warden who with the bedesmen managed the property belonging to the hospital, letting a portion of it and dividing the rent between them: and, on the occasion of a railway company requiring a portion of the land, the warden and bedesmen executed the conveyance, and received the purchase-money, which they expended in improving the hospital premises for their mutual benefit. It was held, upon the authority of *Simpson v. Wilkinson* (2), that each of the bedesmen had an equitable estate of freehold in the room occupied by him, in respect of which he was entitled to be registered for the county.

[GROVE, J. That decision turned upon the acts of ownership: the bedesmen were owners of the land.]

Secondly: At all events, the claimant had a legal estate in a tenement under the 8 Hen. 6, c. 7, or a sum of money issuing out of the land. It is a rent-charge: each of them has a right to be paid a (variable) sum of money issuing out of these lands.

[BOVILL, C.J. If there is any surplus.]

It is not the less a rent-charge because the fund may be subject to prior charges.

[GROVE, J. Was the claimant in *Steele v. Bosworth* (3) entitled to a rent-charge?]

The point was not raised there. This clearly was an interest in land. In *Rex v. Tolpuddle* (4), “pasturage for cows” was held to

(1) 18 C. B. (N.S.) 36; 34 L. J. (C. P.) 84.

(2) 7 M. & G. 50.

(3) 18 C. B. (N.S.) 22; 34 L. J. (C.P.) 57.

(4) 4 T. R. 671.

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be a "tenement" within 13 & 14 Car. 2, c. 12. A money payment out of surplus rents would be equally within Lord Kenyon's judgment in that case. "Anything," he says, "is a tenement which is a profit out of land." And it is not the less a rent-charge because it consists of a fluctuating sum: *Reg. v. Westbrook*. (1) The only reason why the annuity in *Robinson v. Ainge* (2) gave no qualification was, because it issued partly out of realty and partly out of contributions and fines paid by members of the society. In *Ashmore v. Lees* (3), the annual sum which each inmate of the hospital was absolutely entitled to receive out of the profits of the land was not sufficient to confer the franchise.

Manisty, Q.C. (*C. Crompton* with him),[[]for the respondent, was not called upon.

BOVILL, C.J. By the constitution of this hospital, the legal estate in the lands belonging to it is vested in the corporation, which consists of the master and the three antient brethren; and the estates are under the management of the master, who is to receive and take account of the revenues thereof, and, after paying thereout the land-tax, income-tax, tithes, repairs, and other outgoings, carry one third part of the net rents and revenues of the hospital estates to his own account, and to pay 25*l.* to each of the three antient brethren and 70*l.* to the chaplain, and then on the 24th of December in every year divide the residue of the net rents and revenues between the younger brethren in equal shares, so nevertheless that no younger brother shall take under such division more than 25*l.* It seems to me that all that the younger brethren are entitled to is an equitable right to a share of the money which may form the surplus of the trust fund after the making of the payments I have described. The case seems to me to be stronger against the claimant than that of *Steele v. Bosworth*. (4) It is difficult to make out what precise estate or interest in the land the elder brethren take: but, as to the younger brethren, it seems to me to be perfectly clear that all they are entitled to is a money payment out of the surplus, if there be any. If that be so, they have neither a legal nor an equitable estate in the land or in any rent issuing

(1) 10 Q. B. 178; 16 L. J. (Q.B.)
222.

(2) Law Rep. 4 C. P. 429.

(3) 2 C. B. 31; 15 L. J. (C.P.) 65.

(4) 18 C. B. (N.S.) 22; 34 L. J.
(C.P.) 57.

out of the land. The case is governed by *Steele v. Bosworth* (1), and the decision of the revising barrister must be affirmed.

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KEATING, J. I am of the same opinion. Very many cases have arisen out of the claims of inmates of these hospitals to be registered as voters; and the question has always been whether the claimant could make out that he had an interest in any portion of the estates, legal or equitable. In the present case, there is a total absence of anything approaching to evidence of a right to a defined portion of the estate. The revenues of the hospital are received by the master, who, after making certain payments thereout, is to retain for his own share one-third of the net rents, to pay 25*l.* per annum to each of the antient brethren and 70*l.* to the chaplain, and to divide the residue, if any, amongst the younger brethren, not exceeding 25*l.* to each. Without overruling *Steele v. Bosworth* (1), it would be impossible to hold that such an interest as that could confer the franchise upon the younger brethren. The ultimate surplus was undisposed of in that case, as here. The two cases are, therefore, perfectly undistinguishable. The ground upon which the decision there proceeded was, that the claimant was not entitled to any equitable interest in land, but to a mere money payment. That is so here. The claim, therefore, was properly disallowed. It was suggested that this was a rent-charge. But I do not think Mr. Shield placed much reliance upon that, because the sum payable to each of the younger brethren was not a definite, but a fluctuating, indefinite sum. What was he to distrain for? It is impossible to get over that difficulty. The case clearly stands upon the same ground as *Steele v. Bosworth* (1), viz. that the claimant was entitled merely to a share of money.

BRETT, J. In order to sustain his claim to the county franchise, the claimant must shew that he has either a legal or an equitable interest in land. It is not pretended that he has any legal interest. Has he, then, any equitable interest? He must shew either that he has an equitable interest in the whole of the lands as a tenant in common, or an interest in a specific portion of

(1) 18 C. B. (N.S.) 22; 34 L. J. (C. P.) 57.

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them. Can it be said that he is equitable tenant in common with the corporate body of the whole of the lands of the hospital? Not so: the corporation has no beneficial interest in the lands at all. Is he equitable tenant in common with the rest of the younger brethren and the three antient brethren? That cannot be; for, it is admitted that the antient brethren have no equitable interest at all. Then, has he an equitable interest, as joint-tenant or otherwise, in any specific part of the lands? Mr. Shield was compelled to contend that his equitable interest, if any, was in the whole land, and that the payments were a charge upon the whole land. That, however, cannot be maintained: and it is impossible to say what is the particular portion of land to which the claimant is equitably entitled, either as tenant in common or joint-tenant. He is entitled to no specific money payment issuing out of the land or any portion of the land. All he is entitled to is a share of what remains of the rents and revenues of the hospital after the master has paid certain charges and retained his own third part, and paid the 25*l.* to each of the antient brethren and the stipend to the chaplain,—such share in no event to exceed 25*l.* He is not to participate in the surplus, if that should amount to more than enough to pay the 25*l.* to each of the younger brethren. I apprehend that is precisely the ground upon which the decision in *Steele v. Bosworth* (1) proceeded; and therefore that case is a direct authority against the claimant. Then Mr. Shield said that the claimant was the owner of a “freehold tenement” within the 8 Hen. 6, c. 7. He was obliged to contend that this was a rent-charge. If, however, it is only a right to a money-payment, it clearly is not a charge on land. Further, it is a fluctuating sum, for which there could be no power of distress. The claimant, therefore, has neither a legal nor an equitable estate in land, nor a rent-charge. Consequently he has no vote. The decision of the revising barrister must be affirmed.

Decision affirmed.

Attorney for appellant: *J. H. Hickin, for Ralph Simey, Sunderland.*

Attorneys for respondent: *Rogerson & Ford, for Marshall & Son, Durham.*

(1) 18 C. B. (N.S.) 22; 34 L. J. (C.P.) 57.

WEBSTER, APPELLANT; THE OVERSEERS OF ASHTON-UNDER-LYNE,
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*Parliament—County Vote—Rent-charge—“Actual Possession,” under 2 Wm. 4,
c. 45, s. 26—Statute of Uses, 27 Hen. 8, c. 10.*

On the 13th of October, 1871, A., being seised in fee of certain lands, by indenture granted out of them “unto B., C., and D., and their heirs, one perpetual yearly rent-charge of 9*l.*, to be payable by equal half-yearly payments on the 5th of April and 5th of October in each year,” the first payment to be on the 5th of April, 1872, “To hold the said rent-charge unto the said B., C., and D., their heirs and assigns, to the use of the said B., C., and D., their heirs and assigns for ever, as tenants in common, and in equal shares.” The first half-yearly payment was duly made on the 5th of April, 1872:—

Held, first, that, the use being specific and not inconsistent with the rest of the habendum, the whole habendum must be read as specific, and so read, the deed operated as a grant at common law, and not under the Statute of Uses; and therefore, secondly, upon the authority of *Murray v. Thorniley* (2 C. B. 217) and *Hayden v. Twerton* (4 C. B. 1), that the grantees had not been in the “actual possession” of the rent-charge for six calendar months previous to the last day of July, 1872, as required by the 2 Wm. 4, c. 45, s. 26, and were not entitled to be registered in that year as county voters.

Heelis v. Blain (18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88) distinguished.

APPEAL from the revising barrister for the South Eastern Division of the County of Lancaster.

Robert Byron Orme, on the list of claimants, was objected to.

The claim was in respect of “one-third share of rent-charge issuing from freehold land and buildings;” and in the fourth column “William Orme,” was named as “owner.”

By an indenture dated the 13th of October, 1871, and made between William Orme of the one part, and Robert Byron Orme, Enoch Lawton, and James Kerfoot of the other part, W. Orme, being seised in fee-simple in possession of certain lands, messuages, and hereditaments in Ashton-under-Lyne, granted unto R. B. Orme, Lawton, and Kerfoot, and their heirs, one perpetual yearly rent-charge of 9*l.*, to be payable, clear of all deductions (except property or income-tax), by equal half-yearly payments, on the 5th of April and 5th of October in each year, and the first payment to be due on the 5th of April then next, and to be issuing from and out of and charged and chargeable upon the said lands,

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messuages, and hereditaments, To hold the said rent-charge unto the said R. B. Orme, Lawton, and Kerfoot, their heirs and assigns, to the use of the said R. B. Orme, Lawton, and Kerfoot, their heirs and assigns for ever, as tenants in common, and in equal shares.

There was a covenant by William Orme with R. B. Orme, Lawton, and Kerfoot, to pay the rent-charge at the times and in manner appointed for payment thereof, and a power of distress over the lands, &c., in case of non-payment.

The moiety of the rent-charge of 9*l.* due on the 5th of April, 1872, was paid by William Orme to and equally divided between the said R. B. Orme, Lawton, and Kerfoot.

It was contended by the objector that R. B. Orme had not been in the actual possession of the rent-charge for six calendar months previous to the last day of July, 1872, as required by the 2 Wm. 4, c. 45, s. 26.

It was contended by the party objected to, upon the authority of *Heelis v. Blain* (1), that the Statute of Uses, 27 Hen. 8, c. 10 (2),

(1) 18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88.

(2) 27 Hen. 8, c. 10, s. 1, recites that, "Where by the common law of this realm lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred from one to another but by solemn livery and seisin, matter of record, writing sufficient made bonâ fide without covin or fraud; yet, nevertheless, divers and sundry imaginations, subtle inventions, and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents, and trusts; and also by wills and testaments sometime made by nude parolx and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such times as they have scanty

had any good memory or remembrance; at which times they, being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences, and trusts, divers and many heirs have been unjustly at sundry times disinherited, the lords have lost their wards, marriages, reliefs, heriots, escheats, aids pur fair fits chivalier et pur fair fil marier, and scanty any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles, and duties; also men married have lost their tenancies by the curtesy, women their dowers, manifest perjuries by trial of such secret wills and uses have been committed, the King's highness hath lost the pro-

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operated to give to the grantees the actual possession of the rent-charge on the execution of the indenture.

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fits and advantages of the lands of persons attainted and of the lands craftily put in feoffment to the uses of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords their escheats thereof; and many other inconveniences have happened and daily do increase among the king's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm;" and, "for the extirping and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses, and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the King's highness or any other his subjects of this realm shall not in any wise hereafter by any means or inventions be deceived, damaged, or hurt by reason of such trusts, uses, or confidences,"—enacts that "where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise by any manner means whatsoever it be,—in every such case, all and every such person and persons, and bodies politic, that have or hereafter shall have any such use, confidence, or trust, in fee-simple, fee-tail, for term of life or for years, or otherwise, or any use, confidence, or trust in remainder or reverter, shall from thenceforth stand and be seised, deemed, and adjudged in lawful seisin, estate, and possession of

and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates as they had or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons that were or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use, confidence, or trust, after such quality, manner, form, and condition as they had before, or in or to the use, confidence, or trust that was in them."

Sect. 2 enacts, that "where divers and many persons be, or hereafter shall happen to be, jointly seised of and in any lands, tenements, rents, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any of them that be so jointly seised, that in every such case those person or persons which have or hereafter shall have any such use, confidence, or trust in any such lands, tenements, rents, reversions, remainders, or hereditaments, shall from thenceforth have and be deemed and adjudged to have only to him or them that have or hereafter shall have any such use, confidence, or trust, such estate, possession, and seisin of and in the same lands, tenements, rents, reversions, remainders, and other hereditaments, in like nature, manner, form, condition, and course, as he or they had before in the use, confidence, or trust of the same lands, tenements, or hereditaments."

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The revising barrister, upon the authority of that case, held that the claim was good.

Nov. 13. *Herschell, Q.C.*, for the appellant. In *Murray v. Thorniley* (1) it had been held that the words "actual possession" in 2 Wm. 4, c. 45, s. 26, mean a possession in fact, as contradistinguished from a possession in law; and therefore that a grantee of a rent-charge is not entitled to be registered unless he has been in the actual receipt of it for six months before the last day of July. And in *Hayden v. Twerton* (2) Maule, J., says: "The case of *Murray v. Thorniley* (1) proceeded on the ground that the seisin requisite to entitle a party to be registered in respect of a rent-charge is such as would have been necessary to enable the grantee to maintain an assize." The question in the present case is, whether it is distinguishable from *Heelis v. Blain* (3), where it was held that, where a rent-charge is created by a conveyance to uses, the grantee immediately acquires "actual seisin" by the words of the 27 Hen. 8, c. 10, s. 1 (4), and after six months is entitled to be registered in respect thereof, notwithstanding he may not have actually received any part of the rent. There the grant was to B. and his heirs, habendum to B. and his heirs, to the use of A., B., C., D., E., and F., their heirs and assigns, as tenants in common. Here it is to B., C., and D., and their heirs, to the use of the said B., C., and D., and their heirs for ever, as tenants in common: and the question is, whether the addition of the words "to the use of" makes that operate as a conveyance under the Statute of Uses which otherwise would be a conveyance at common law. The Statute of Uses has no application except to a case where one person stands seised to the use of another.

[BOVILL, C.J. The only operation of the words "to the use of" would seem to be to prevent any resulting trust in the grantor.

GROVE, J. In Sanders on Uses, 5th ed. p. 89, it is said: "The statute says that, 'where any person or persons stand or be seised, &c., to the use, confidence, or trust of any other person or persons,'

(1) 2 C. B. 217; 15 L. J. (C.P.) 155.

(3) 18 C. B. (N.S.) 90; 34 L. J.

(2) 4 C. B. 1, at p. 8; 16 L. J. (C.P.)

(C.P.) 88. *11/2 25 18*

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(4) Ante, p. 282, n. (2).

&c.: and therefore, if a use be limited to a feoffee, conuzee, recoveror, or releasee, such use, generally speaking, is not executed by the statute, but the feoffee, &c., is in by the common law. In this case, notwithstanding the grantee is in by the common law, yet, after the declaration of the use to him, he has not only a seisin but a *use*, although not the use which the statute requires; and therefore that seisin which, before the limitation of the use to himself was open to serve uses declared to a third person, is by the limitation filled up, and will not admit of any other use being limited on it; upon the principle that a use cannot be limited upon a use.”]

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If this be a grant at common law only, the case is on all fours with *Murray v. Thorniley*. (1) Tindal, C.J., in giving the judgment of the Court, there says (2): “As it is quite clear that, in the case of land, there must be more than the execution of the conveyance,—that there must be actual possession or receipt of the rents or profits,—there seems no reason why, in the case of an incorporeal hereditament, to which the provision of the statute equally applies, there should not be such further actual possession as the nature of the subject itself is capable of.” Until receipt of rent, there was no actual possession.

[GROVE, J. *Jenkins v. Young* (3), which is cited in Sanders on Uses, 5th ed., p. 91, and also in Gilbert on Uses, 3rd ed., by Sugden, p. 127, and referred to in an elaborate opinion of Mr. Booth, in Cases and Opinions, vol. 2, p. 291, is a strong authority to shew that this is a common-law conveyance.

BOVILL, C.J., referred to Williams on Real Property, 8th ed., pp. 152—155.

GROVE, J. After the reference to *Jenkins v. Young* (3), Sanders goes on to say: “So, if an estate be conveyed to A., B., and C., and their heirs, ‘to hold unto the said A., B., and C., their heirs and assigns, to the use of the said A., B., and C., for and during the natural lives of them and the life and lives of the survivor and survivors of them,’ it should seem that this is not a statute use, but that A., B., and C. will take an estate of freehold for their lives by the common law.”]

If the Statute of Uses does not apply, this is a common-law

(1) 2 C. B. 217; 15 L. J. (C.P.) 155.

(2) 2 C. B. at p. 225.

(3) Cro. Car. 230.

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grant, and the decision of the revising barrister was in direct contravention of *Murray v. Thorniley* (1) and *Hayden v. Twerton*. (2)

John W. Mellor (*Kenelm Digby* with him), for the respondents. This case is governed by *Heelis v. Blain*. (3) One great distinction between a grant at common law and a grant under the Statute of Uses is, that there must be a consideration for the former, but none is needed for the latter. Erle, C.J., in the case just referred to, says that "the two cases which have held that actual receipt of the rent is essential to perfect the right to be registered, shew that the handing over anything in the name of rent would afford less facility of proof than the production of a deed operating by virtue of the Statute of Uses." In *Williams on Real Property*, 8th ed., p. 153, it is said: "Suppose a feoffment to be now made simply to A. and his heirs, without any consideration. We have seen that before the statute the feoffor would in this case have been held in equity to have the use, for want of any consideration to pass it to the feoffee: now, therefore, the feoffor, having the use, shall be deemed in lawful seisin and possession, and consequently, by such a feoffment, although livery of seisin be duly made to A., yet no permanent estate will pass to him; for, the moment he obtains the estate, he holds it to the use of the feoffor; and the same instant comes the statute, and gives to the feoffor, who has the use, the seisin and possession. (4) The feoffor, therefore, instantly gets back all that he gave; and the use is said to *result* to himself. If, however, the feoffment be made *unto and to the use* of A. and his heirs, as before the statute A. would have been entitled for his own use, so now he shall be deemed in lawful seisin and possession, and an estate in fee-simple will effectually pass to him accordingly." And see *Gilbert on Uses*, 3rd ed., by Sugden, p. 89. In *Williams on Real Property*, p. 182, it is said: "Suppose a person should wish to convey a freehold estate to another, reserving to himself a life-interest,—without the aid of the Statute of Uses he would be unable to accomplish this result by a single deed. But by means of the statute he may now make a conveyance of the property to the other and his heirs, *to the use* of himself (the conveying party)

(1) 2 C. B. 217; 15 L. J. (C. P.) 155.

(3) 18 C. B. (N.S.) 90; 34 L. J. (C. P.) 88. *Wheat v. Blain*

(2) 4 C. B. 1; 16 L. J. (C. P.) 88.

(4) Citing *Sanders on Uses*, 99, 100.

for his life, and, from and immediately after his decease, *to the use* of the other and his heirs and assigns. By this means the conveying party will at once become seised of an estate only for his life, and after his death an estate in fee-simple will remain for the other."

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[DENMAN, J. The limitation here is to three persons, to the use of the same three. Is that within the words of the statute,— "where any person or persons stand or be seised, &c., of any lands, &c., to the use, &c., of any *other* person or persons," &c.? Must they not all be "other persons?" In Gilbert on Uses, p. 132 (1), it is said: "If a man infeoffs or levies a fine to A. in fee, to the use of himself and B., and their heirs, they are at common law joint-tenants of the use; the estate in a use vests according to the intent of the parties, which was to place the entire use in them, and the possession only in A.: and, since the statute executes the possession in the same manner as the use was, they were not tenants in common, as one in by the common law and the other by the statute, but joint-tenants by the words of the statute."]

Each of the three grantees here would be trustee to pass the possession to the other two, or two of them to pass it to the third. If the statute has any operation at all, it is to confirm the previous estate.

Herschell, Q.C., in reply. The grantees take as joint-tenants or as tenants in common according to the expressed intention of the grant, apart from any operation of the Statute of Uses. The preamble of the Statute of Uses shews that it never was intended to apply to such a case. *Murray v. Thorniley* (2) decides that a grant of a rent-charge does not give "actual possession."

BOVILL, C.J. The question is whether the deed operates at common law, or as a grant under the Statute of Uses; and this depends on whether the habendum can be construed as conveying the rent-charge to the grantees as tenants in common. That raises an important point, which we think Mr. Mellor ought to have an opportunity of looking into more fully.

Nov. 19. *J. W. Mellor* (*Kenelm Digby* with him). Bacon says,—

(1) Referring to *Samme's Case*, 13 Rep. 54, and *Pernell v. Bridge*, Hutt. 112. (2) 2 C. B. 217; 15 L. J. (C.P.) 155.

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Reading upon the Statute of Uses, 2nd ed., p. 65,—“The whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate; therefore the statute ought to be expounded that, where the party seised to the use and the cestui que use is one person, he never taketh by the statute, *except there be a direct impossibility or impertinency for the use to take effect by the common law.*” Unless the appellant brings this case within the exception, it must be conceded that he is out of court. Now, the first part of the habendum is “to Orme, Lawton, and Kerfoot, their heirs and assigns,” which, if those words stood alone, would make them joint-tenants in fee-simple. The limitation of the use is to the same three “their heirs and assigns for ever, as tenants in common.” That is a direct repugnancy or impertinency.

[BOVILL, C.J. The argument on the other side will be, that, when the whole deed is looked at, it is a grant to the three as tenants in common, and therefore the deed enures as a grant at common law, and not under the statute.]

The only case in favour of that view is *Jenkins v. Young* (1) or *Meredith v. Jones* (2). But the reason of the decision was that the deed was obscure, and therefore the Court acted upon what it conceived to have been the real intention of the parties. In 1 Cruise's Digest, 4th ed., p. 357, it is said: “There are some cases where the same person may be seised to a use and also cestui que use. Thus, if a man makes a feoffment in fee to one, to the use of him and the heirs of his body; in this case, for the benefit of the issue, the statute, according to the limitation of the uses, divests the estate vested in him by the common law, and executes the same in himself, by force of the statute. And yet the same is out of the words of the statute, which are, ‘to the use of any other person,’ and here he is seised to the use of himself. But the statute has always been beneficially expounded, to satisfy the intention of the parties, which is, the direction of the use according to the rule of law.”

[BOVILL, C.J. The authority cited for that,—*Samme's Case* (3),—does not support what Cruise lays down; and, moreover, the

(1) Cro. Car. 230.

(2) Cro. Car. 244.

(3) 13 Rcp. 54.

resolution is very ambiguous, and was not necessary to the decision of the case.]

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Another case put by Bacon, p. 65, is,—“If I infeoff J. S. in fee, to the use of himself in tail, and then to the use of J. D. in fee; or covenant to stand seised to the use of myself in tail, and to the use of my wife in fee; in both these cases the estate-tail is executed by this statute.”

[GROVE, J. If the estate is changed, the use is executed by the statute; if the estate is the same, the grant takes effect by the common law. The difficulty here is, whether this is a limitation to the three as joint-tenants or as tenants in common.]

Bacon goes on to give a reason,—“because an estate-tail cannot be re-occupied out of a fee-simple, being a new estate, and not like a particular estate for life or years, which are but portions of the absolute fee; and therefore, if I bargain and sell my land to J. S. after my death without issue, it doth not leave an estate-tail in me, nor vesteth any present fee in the bargainee, but is an use expectant.” Sanders says, at p. 92, 5th ed.: “When a grantee to uses takes a partial or limited estate under the limitation, and the remaining portion of the use is declared to a third person, the grantee may in some cases acquire a legal estate by the statute; and I apprehend that the ground of this construction is, that the words of the statute being satisfied by the limitation of part of the use to a third person, Courts of law will give effect to the whole limitation in such a way as to make it conformable either to established rules of law or to the intention of the parties. First, where the use is limited to the feoffee *in tail* out of his own seisin in fee, and the remainder over to another; as, if a feoffment be made to J. S. in fee, to the use of himself in tail, with remainder to D. in fee; or, if J. S. covenant to stand seised to the use of himself in tail, with remainder to the use of his wife in fee; in both these cases the estates tail limited to J. S. are executed by the statute. But I apprehend that the construction would have been different in the case of the feoffment, if the whole seisin had not been limited to the feoffee.” The cases executed by the statute are cases where the estate first given is a fee. Bacon goes on, p. 66: “Like law, if I infeoff a bishop and his heirs, to the use of himself and his successors, he is in by the statute in the

1872 right of his see." This is further exemplified in Sanders, p. 91 :

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"So, if an estate be conveyed to A., B., and C., and their heirs, 'to hold unto the said A., B., and C., their heirs and assigns, to the use of the said A., B., and C., for and during the natural lives of them and the life and lives of the survivor and survivors of them,' it should seem that this is not a statute use, but that A., B., and C., will take an estate of freehold for their lives, by the common law." In 2 Bl. Com. p. 192, it is said that "the law is apt in its construction to favour joint-tenancy rather than tenancy in common, because the divisible services issuing from land (as rent, &c.) are not divided, nor the entire services (as, fealty,) multiplied, by joint-tenancy, as they must necessarily be upon a tenancy in common." This is not at all like the case of *Jenkins v. Young*. (1) There the first limitation was to the husband and wife for life, and the declaration of use was to them in fee-tail.

[BRETT, J. How do you distinguish the case as put in 1 Sanders, p. 91?]

Here the whole estate is exhausted by the first part of the habendum. It is more like the case put in Bacon, p. 66, of the feoffment to the bishop.

[DENMAN, J. Mr. Butler, in the note (231. vi.) to Co. Litt. 272. a., says : "With respect to the mode by which conveyances to uses operate,—It is to be observed that to raise an use under the statute, the possession or seisin to serve the use must be in some person distinct from the cestui que use ; as the statute requires that the person seised to the use and the person to whom the use is limited should be different persons ; so that, if the possession is conveyed, and the use limited to the same person, at least if the use is limited in fee-simple, that is not an use executed by the statute, but the party is in by the common law : for, the statute of uses mentions those cases only where 'any person or persons stand seised to the use of any other person or persons.' " And then he refers to *Jenkins v. Young*. (1) That note is cited in Watkins on Conveyancing, 9th ed., p. 245, n.]

Bacon says, at p. 50 : "The second case, of the joint-feoffees [to the use of some or one of them] needs no exposition ; for, it pursueth the penning of the general case : only this I will note, that,

(1) Cro. Car. 230.

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although it had been omitted, yet the law upon the first case would have been taken as the second case provided; so that it is rather an explanation than an addition; for, turn that case the other way, that one were enfeoffed to the use of himself and another, I hold the law to be, that in the former case they shall be seised jointly, and so in the latter case cestui que use shall be seised solely; for the word 'other,' it shall be qualified by the construction of cases, as shall appear when I come to my division. But, because this case of co-feoffees to the use of one of them was a general case in the realm, they foresaw it, and expressed it precisely, and passed over the case *à converso*, which was but an especial case; and they were loth to bring in this case by inserting the word 'only' into the first case, to have penned it to the use only of other persons."

[BOVILL, C.J. In *Doe v. Prestwidge* (1), the limitations were very much like those in the present case. G., T., and H., tenants in common in tail; G. released his share to T. and H., habendum to them, their heirs and assigns, as tenants in common and not as joint-tenants, to the only proper and absolute use and behoof of them, their heirs and assigns, for ever. Reader, counsel for the lessors of the plaintiff, after time given him to consider, "admitted that T. and H. took as tenants in common; for, the habendum is 'to them, their heirs and assigns, as tenants in common, and not as joint tenants, to the use of them, their heirs and assigns;' and although, if this had been a use executed by the statute, the consequence would be that they were joint tenants, yet he admitted that, when the person seised to the use and cestui que use is the same, the statute does not operate." If, looking at the whole deed, it plainly appears that the limitation was intended to be to the grantees or feoffees and to their heirs as tenants in common, there is no inconsistency or impertinency.

BRETT, J. Where one part of the habendum is general and the other part specific, the rule of construction is to construe the general to mean the same as the specific.]

Herschell, Q.C., contra. In every text-book, and every authority, with one possible exception, it has been invariably laid down

(1) 4 M. & S. 178.

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that, in order to make the Statute of Uses apply, the persons taking the use must be, one or more of them, persons who are not named in the seisin to uses; in other words, that the statute means what it says. (1) Mr. Booth, in *Cases and Opinions*, Vol. 2, p. 281, 290; says: "Every statute-use must be derived out of the seisin of some third person, so that it may be always predicated that there doth or do exist some person or persons who doth or do stand seised to the use of the said A., B., C., D., E., and F., for years, life, or in tail, &c. And where there is not such standing seised by some such third person, such statute-use is not good. For example, if there should be such a bargain and sale or lease for a year to J. S. as I have before mentioned, and then a release to him of the lands, to hold to him and his assigns for his life, or to hold to him and his assigns only (leaving out the word heirs), to the use of A. for life, with remainder to B., C., D., E., and F., successively, for life, years, or in tail; then afterwards, if J. S. was to die, all the uses would be void, because, J. S. acquiring by the release no larger estate or seisin than for his life, and that being determined by his death, there could remain nothing out of which the uses could be derived; and it could not be predicated that the heirs of J. S. stood seised to the use of the several persons named in the deed: and, if some person or persons did not stand seised to those uses, the case would not fall within the provision of the statute of Hen. 8, which turns no uses into legal estates but such as were trusts before the statute, where there always was a third person who held the estate, and whose conscience was bound by the trust. And the words of the statute are so framed as to be conformable to the old usage: it says expressly, that, wherever there is a person seised to the use of any other person, he to whose use he is seised shall be deemed to be in possession of the land for the same estate as he has in the use." Referring to *Jenkins v. Young* (2), he says: "There, it was argued that the estate out of which the use should arise being no more than an estate for life, the use could not make the estate larger than the limitation: but the judges said they conceived that there was a difference where an estate was limited to one, and the use to a stranger; there the use should not be more than the estate out of which it was derived; but not when the

(1) See *Doe v. Passingham*, 6 B. & C. at p. 316, per Holroyd, J.

(2) Cro. Car. 230.

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limitation was to two, habendum to them, to the use of them and the heirs of their bodies; that was no limitation of the use; nor was the use to be executed by the statute: but it was a limitation of the estate to them and the heirs of their bodies; and they were in by course of common law; and so it should be taken as a limitation to them and the heirs of their bodies, remainder to the other and the heirs of the other, that the deed might be construed according to the intent of him that made it." In *Gilbert on Uses*, 3rd ed., p. 128, where *Jenkins v. Young* (1) is cited, Sugden adds the following note: "It is not a use divided from the estate, as, where it is limited to a stranger; but the estate and the use go together: wherefore it is all one as if the limitation had been to them and the heirs of their bodies. There is a laborious opinion of Mr. Booth's on this point in 2 Cases and Opinions, p. 281." Sanders on Uses, p. 91, is to the same effect. Here, the grant is to O., L., and K., and their heirs, habendum "unto the said O., L., and K., their heirs and assigns, to the use of the said O., L., and K., their heirs and assigns for ever, as tenants in common." The habendum is all one limitation. The use and the estate are limited to the same persons. The case is concluded by the words of the statute and by the authorities upon it. It is a common-law conveyance, and has nothing whatever to do with the statute. The only semblance of an authority the other way is the resolution in *Samme's Case*. (2) That, however, is a mere dictum, and it is put as an exception "in favor of the heirs."

BOVILL, C.J. In this case, Robert Byron Orme claimed to be put on the list of voters for the south-eastern division of the county of Lancaster in respect of his right and interest in a "freehold rent-charge." Objection was taken to the claim on the ground that the claimant had not been in the actual possession of the rent-charge for six months, within the terms of s. 26 of the Reform Act, 2 Wm. 4, c. 45. Upon the facts stated by the revising barrister, it is clear that he had not been during the prescribed period in the actual perception or receipt of the rent. In two cases before this Court it has been decided that, to entitle a person to be registered in respect of a rent-charge, he must

(1) Cro. Car. 230.

(2) 13 Rep. 54.

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have been in actual possession, in the sense in which those words "actual possession" are ordinarily understood. The first of these was *Murray v. Thorniley* (1), where, after much consideration, the Court unanimously came to the decision that that was the proper construction of the statute as applied to rent-charges. The same point arose again in *Hayden v. Twerton*. (2) In that case the party claiming to be registered was the assignee of a rent-charge. The matter was again carefully considered, and the Court held that the case was governed by the decision in *Murray v. Thorniley*. (1) It is true that Maule, J., in giving judgment there, did refer to some of the grounds upon which the previous decision was founded, and stated that he was not prepared to say that he should have come to the same conclusion as the Court came to in that case; but he concurred with the rest of the Court in confirming the principle on which it was decided.

Now, after those two decisions, I think it is hopeless for the respondents in this case to contend that we are not bound by what has been treated as the law ever since the year 1846, viz. that the possession of a rent-charge, to satisfy the Reform Act, must be a possession in fact.

The question afterwards arose in a different form. In *Heelis v. Blain* (3), a new view of the matter was suggested, viz. that when the grant of the rent-charge did not take effect at common law, but by the Statute of Uses, 27 Hen. 8, c. 10, the statute executed the use in possession; and so the grantee became at once in actual possession. The case was argued entirely upon that footing. The rent-charge there undoubtedly came within the statute, and it was held that the person to whose use the grantee was seised was by the effect of the Statute of Uses to be deemed to be in possession of the rent-charge so as to satisfy the words "actual possession" in s. 26 of the Reform Act. So far from dissenting from the previous cases of *Murray v. Thorniley* (1) and *Hayden v. Twerton* (2), the Court expressly adopt them, and hold that the possession to satisfy s. 26 must be an actual possession: but they came to the conclusion that the claimant in the case then before

(1) 2 C. B. 217; 15 L. J. (C.P.) 155.

(2) 4 C. B. 1; 16 L. J. (C.P.) 88.

(3) 18 C. B. (N.S.) 90; 34 L. J.

(C.P.) 88. *11 Jan 66-1875*

them was to be deemed to have been in such actual possession by the operation of the Statute of Uses.

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Assuming these cases to have been correctly decided, there are, then, two classes of cases,—one, where the grant of the rent-charge takes effect at common law, in which case the grantee or assignee must have been in the actual possession by receipt of the rent in order to be entitled to be registered,—the other, where the grant of the rent-charge operates by virtue of the Statute of Uses, in which case it has been held that the cestui que use is at once to be deemed in actual possession, within the meaning of the Reform Act. That brings us to the question whether the grant of the rent-charge in the case now before us operates at common law or under the Statute of Uses. The subject is one of interest to conveyancers, and one which may have a material effect on titles, and therefore we thought it right to adjourn the argument in order to give counsel an opportunity to look more fully into the authorities. The matter has now been very ably argued, and the points have been very clearly put.

Our first duty is to ascertain what is the true legal effect of the limitations in the deed granting this rent-charge. It commences by granting to Orme, Lawton, and Kerfoot, a perpetual yearly rent-charge of 9*l*. If it had stopped there, that would have been a grant to the three as joint-tenants. The deed, however, proceeds in the habendum, “to hold the said rent-charge unto Orme, Lawton, and Kerfoot, their heirs and assigns, to the use of the said Orme, Lawton, and Kerfoot, their heirs and assigns for ever, as tenants in common, and in equal shares.” If the terms of the habendum be divided, there would be a grant to the three persons as joint-tenants, and a limitation of the use to them as tenants in common. Now, is the deed to be so read? or is the whole to be read together for the purpose of ascertaining what is the true limitation? The office of the habendum, according to 1 Sheppard's Touchstone, p. 101, is to determine the effect of the deed, and it should “be construed as near the intent of the parties as may be.” In order to ascertain the intention of the parties, it is necessary that the whole deed should be looked at; and, if that be done in the present case, there can be no doubt that the intention of the parties was that the grant of the rent-charge

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Now, in order to shew what is the true effect of a deed of this description, several authorities have been referred to; and, amongst those cited on the part of the respondents, was the case of *Jenkins v. Young* (1), more fully reported under the name of *Meredith v. Jones*. (2) That case is thus stated in Sanders on Uses, p. 91: "M. gave his land to E. R. and his wife, habendum to the said baron and feme, to the use of them and the heirs of their two bodies, and, for want of such issue, remainder to E. M. and his heirs: the question was whether the baron and feme had an estate-tail or an estate for their lives only. It was argued that the estate out of which the use should arise was an estate for their lives, and the use could not make the estate larger than the limitation of the seisin; but the judges conceived that there was a difference where an estate was limited to one and the use to a stranger, for there the use should not be more than the estate out of which it was derived; but not when the limitation was to two, habendum to them, to the use of them and the heirs of their bodies, for this was *no limitation of the use*, nor was it executed by the statute, but it was a limitation of the *estate* to them and the heirs of their bodies *by the course of the common law*." That case is also important as shewing that we must look at the whole of the habendum to see what was the intention of the parties. So construing it, it was held to be not a limitation of the use, but a limitation of the estate which took effect by the common law. It

(1) Cro. Car. 230.

(2) Cro. Car. 244.

is extremely difficult, if this be the right view of that case, to distinguish it in principle from the present. In that sense it is that the case is adopted by Mr. Booth in the Collection of Cases and Opinions, Vol. 2, p. 291, edit. by Sugden. That learned author very clearly explains that the use must be derived out of the seisin of some third person. The case is referred to by Sanders without disapprobation; as also by Mr. Butler in his Notes to Co. Litt. 271. b., and in Watkins on Conveyancing, p. 245; and it has been acted upon as law by conveyancers for a long series of years. Is there, then, any reason why we should not adopt the same view in construing the limitation of the rent-charge in the present case? If we were to do otherwise, the result would be a repugnancy between one part of the deed and another part, because then, in the one part the limitation would be to the three persons as joint tenants, and in the other part it would be to them as tenants in common, which clearly would not be carrying out the intention of the parties. The rule was, shortly after the passing of the statute, thus laid down by Bacon, in his Reading upon the Statute of Uses, p. 65, edit. of 1806: "The whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate; therefore, the statute ought to be expounded that, where the party seised to the use and the cestui que use is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use to take effect by the common law."

Suppose the question had arisen here, without reference to the Statute of Uses, as to what was the true construction of the limitation, could any one have doubted that the object and effect of the deed were that the three persons named should take the rent-charge as tenants in common? If so, the Statute of Uses cannot alter the common-law construction of the deed. The case of *Doe v. Prestwidge* (1) has also an important bearing upon this question, as shewing that the whole limitation in the habendum is to be taken together, and a rational interpretation to be put upon it. There, the limitation was to Thomas and Henry and their heirs, habendum to them, their heirs and assigns, as tenants in common,

(1) 4 M. & S. 178.

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and not as joint-tenants, to the only proper and absolute use and behoof of them, their heirs and assigns for ever. There was, therefore, a difference between the two parts of the habendum, the limitation of the use being such as to create a joint-tenancy. The matter was argued, and further time was given to Reader, the counsel for the plaintiff, to consider it; and upon a subsequent day, "he admitted that Thomas and Henry took as tenants in common," "although, if it had been an use executed by the statute, the consequence would be that they were joint-tenants." That case is cited by various text-writers; and I do not find that it is questioned by any of them, except that in 3 Bythewood and Jarman's Conveyancing, p. 324, the learned editor (Sweet) says: "This was certainly admitting the principle to a great extent, and it seems that there was ample room for argument." That room has been afforded here, and the result shews that there is no authority to contradict it. There is also an important passage in the 7th edition of Sheppard's Touchstone, by Preston, at p. 106, where that very great conveyancer says: "But, if a grant be made to a man and his heirs, habendum to him and his heirs, to the use of him and his heirs for lives, this habendum and declaration of use are one entire limitation at the common law, and the grantee hath merely an estate for the lives," which passage is very applicable to the present case. It is, indeed, only acting upon the general rule of construction of a deed, which is, that, in order to ascertain the intention of the grantor, regard must be had to the whole of the instrument, and especially of the habendum. So dealing with the deed in the present case, the effect of it seems to me to be that the three persons named take the rent-charge as tenants in common. Each takes a legal estate in an undivided third part of the rent; and, no third party intervening, there is nothing for the Statute of Uses to operate upon. The party claiming, therefore, taking by force of the common law, the case is entirely out of the operation of the Statute of Uses. Consequently, it cannot come within the decision in *Heelis v. Blain* (1), but is governed by the two previous cases of *Murray v. Thorniley* (2) and *Hayden v. Twerton*. (3)

(1) 18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88.

(2) 2 C. B. 217; 15 L. J. (C.P.) 155.

(3) 4 C. B. 1; 16 L. J. (C.P.) 88.

The decision of the revising barrister, therefore, must be reversed, on the ground that the claimant had not been in actual possession of the rent-charge for the period required by s. 26 of the Reform Act of 1832.

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BRETT, J. In this case Orme claimed to be registered as a voter in respect of a rent-charge; and, in order to substantiate his claim, it was necessary for him to bring himself within s. 26 of 2 Wm. 4, c. 45, that is, to shew that he had been in "actual possession" of the rent-charge for six months previously to the last day of July. In point of fact he had not been in actual receipt of the rent for the required period, the first payment having only become due on the 5th of April preceding; and the question is, whether, notwithstanding this, the claimant has brought himself within s. 26.

It seems to me that there are two canons or rules of conduct which the Court in dealing with these revising appeals ought to observe. The first is, to construe the words of these statutes according to their ordinary meaning; and the second is, to adhere loyally to former decisions, unless clearly satisfied that they are wrong. Now, the first case which is applicable to the present is that of *Murray v. Thorniley*. (1) It was there held that "actual possession" in s. 26 of the Reform Act meant a possession in fact as contradistinguished from a possession in law. The next case was *Heelis v. Blain* (2), where it was held that, though the grantee of a rent-charge under a grant at common law is not entitled to be registered until he has been in the actual receipt of the rent for six months prior to the last day of July, since until such receipt he had only a possession in law, and not the actual possession required by 2 Wm. 4, c. 45, s. 26, it is otherwise where he acquires the rent-charge by a conveyance operating under the Statute of Uses, for then the person to whose use the rent-charge is limited is by virtue of the Statute of Uses to be deemed to be in actual possession. It follows, therefore, if we observe the rule of conduct I have referred to, that, if the deed conveying the rent-charge in the present case operates at common law, the case is governed by

(1) 2 C. B. 217; 15 L. J. (C.P.) 155.

(2) 18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88.

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Murray v. Thorniley (1); and that, if it operates under the Statute of Uses, then the case is governed by *Heelis v. Blain* (2), and we are bound to hold, whatever be our opinion of that case, that the possession given by the Statute of Uses is the possession required by the Reform Act. The result is, that the question for our determination is whether the deed conveying the rent-charge in respect of which Orme claimed in this case was one which operated at common law or by virtue of the Statute of Uses.

The result of the authorities cited is this: You must first look at the whole deed of conveyance; and wherever the grant in the habendum and the declaration of uses is to the same person, if the description is general in the one part and specific in the other part, the latter is to override the former; and, so reading it, it is a common-law conveyance, and the Statute of Uses has no application at all. In *Jenkins v. Young* (3), the limitation was to E. R. and his wife, in the form of a declaration of uses; but, inasmuch as the habendum was general in its terms, and not inconsistent with the declaration of the use, it was held that it was "a limitation of the estate to them and the heirs of their bodies by the course of the common law." The case put in *Sanders on Uses*, p. 91, is open to the same observation. The limitation was to A., B., and C., and their heirs, to the use of A., B., and C., for their lives and the life of the survivor. There again the habendum was general, and the supposed declaration of use specific; but there was no inconsistency, and therefore the habendum was read as specific, and the conveyance was held to be a common law conveyance. In *Doe v. Prestwidge* (4), the habendum was to two persons, their heirs and assigns, as tenants in common, and not as joint-tenants: that which was called the declaration of uses was general, "to the use of them, their heirs and assigns;" but, inasmuch as the habendum was specific, it was held that the whole must be read as if the declaration of uses had been as specific as the limitation, and so the deed took effect as a common-law conveyance. This seems to me to be the result of the opinions of Lord Bacon, Mr. Booth, Mr. Butler, and Lord St. Leonards.

(1) 2 C. B. 217; 15 L. J. (C.P.) 155.

(3) Cro. Car. 230.

(2) 18 C. B. (N.S.) 90; 34 L. J.

(4) 4 M. & S. 178.

(C.P.) 88.

Apply that to the present case. The grant is to Orme, Lawton, and Kerfoot and their heirs,—habendum “to Orme, Lawton, and Kerfoot, their heirs and assigns, to the use of the said Orme, Lawton, and Kerfoot, their heirs and assigns for ever, as tenants in common, and in equal shares.” The habendum is general, and the declaration of uses specific; therefore the habendum is to be read as if it were as specific as the declaration of the use. Consequently the conveyance is a common-law conveyance of the rent-charge to the three as tenants in common.

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I should have been prepared to go the length of Mr. Herschell's argument, and to say that the Statute of Uses does not apply, unless there be some person named in the declaration of the use who is not named in the grant. It is not necessary, however, to go that length in the present case: it is enough to say that, one part of the habendum being general, and the other part specific, the whole is to be read together, and the intention collected from that part which is specific.

The result is that this must be taken to be a common-law conveyance, and not a conveyance operating by force of the Statute of Uses. The case is, therefore, within *Murray v. Thorniley* (1), and is not within *Heelis v. Blain*. (2) I therefore think the decision of the revising barrister was wrong, and that the appeal must be allowed.

GROVE, J. I am of the same opinion. The question turns upon s. 26 of the Reform Act, 2 Wm. 4, c. 25, which enacts that no person shall be registered as a county voter in any year in respect of his estate or interest in any lands or tenements, as a freeholder, unless he shall have been “in the actual possession thereof, or in the receipt of the rents and profits thereof” for his own use, for six calendar months at least next previous to the last day of July in such year. *Primâ facie*, the meaning of those words is clear and simple: “actual possession” would seem to mean an actual and not a constructive possession or receipt of the rent. The proviso which is engrafted upon that section would seem to shew that that is its true meaning,—“provided always, that, where any

(1) 2 C. B. 217; 15 L. J. (C.P.) 155.

(2) 18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88.

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(1) 2 C. B. 217; 15 L. J. (C.P.) 155.

(2) 18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88.

(3) 13 Rep. at p. 56. a.

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seised to the use of any of them, &c. ; and in this case A. is sole seised : but the statute of 27 Hen. 8 hath been always beneficially expounded, to satisfy the intention of the parties, which is the direction of the use according to the rule of the law. So, if a man seised of lands in fee-simple by deed covenants with another that he and his heirs will stand seised of the same land to the use of himself and the heirs of his body, or unto the use of himself for life, the remainder over in fee ; in that case, by the operation of the statute, the estate which he hath at the common law is divested, and a new estate vested in himself, according to the limitation of the use." In Bacon on Uses, edit. 1806, p. 63, it is said "that the whole scope of the statute was to remit the common law and never to intermeddle where the common law executed an estate ; therefore the statute ought to be expounded, that, where the party seised to the use and the cestui que use is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use to take effect by the common law." All the other authorities are in favour of the plain and obvious construction of the words of the statute. In Sanders on Uses, 5th ed., p. 91, after quoting the case of *Jenkins v. Young* (1), it is said : "So, if an estate be conveyed to A., B., and C., and their heirs, to hold unto the said A., B., and C., their heirs and assigns, to the use of the said A., B., and C., for and during the natural lives of them and the life and lives of the survivor and survivors of them, it would seem that this is not a statute use, but that A., B., and C. will take an estate of freehold for their lives by the common law." In the present case the grantees of the rent-charge and the cestuis que use are the same persons ; and the question we have to determine is whether the use is executed by the statute. It has been ingeniously argued by Mr. Mellor that, as by the terms of the grant the grantees would *primâ facie* take as joint-tenants, the limitation of the use to them as tenants in common so changed the character of the estate to which the use attached as to make it in some sense a limitation to different persons. But then comes the case of *Doe v. Prestwidge* (2), which is somewhat the converse of this case, where the habendum was to T. and H. and their heirs, as tenants in common, and not as joint-tenants, and the

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(1) Cro. Car. 230.

(2) 4 M. & S. 178.

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use was to them, "their heirs, and assigns" generally, and it was held that the general words were controlled by the specific words, and that T. and H. took as tenants in common. Counsel for the plaintiff, after time for consideration, admitted that, although, if this had been an use executed by the statute, the consequence would be that T. and H. were joint-tenants, yet that, where the person seised to the use and cestui que use is the same person, the statute does not operate,—“except (as Bacon says) there be a direct impossibility or impertinency for the use to take effect by the common law.” That was in effect the judgment of the Court. Is there here any direct impossibility or repugnancy in holding that the grantees here take as tenants in common? I think not. The specific words of the declaration of uses clearly shew that the intention was not only to limit the use, but to give the original estate to the three persons named and their heirs as tenants in common. If so, the Statute of Uses does not apply.

There may be a difficulty in saying that the possession given by the execution of the use by the statute is different from the possession in law which was held in *Murray v. Thorniley* (1) to be insufficient to satisfy s. 26 of 2 Wm. 4, c. 45; but it is unnecessary to consider that on the present occasion, for we are not now called upon to overrule the case of *Heelis v. Blain*. (2)

DENMAN, J. I am of the same opinion. The only question raised by the revising barrister in this case is, whether the circumstances bring it within *Heelis v. Blain*. (2) He decided that they did; and that, I think, was a wrong decision. *Heelis v. Blain* (2) was very carefully decided so as to leave untouched the two previous cases of *Murray v. Thorniley* (1) and *Hayden v. Twer-ton*. (3) I observe that Erle, C.J., in his judgment in *Heelis v. Blain* (4) says: “If it had been the case of a conveyance at common law, without the aid of the Statute of Uses, it is clear, from the cases of *Murray v. Thorniley* (1) and *Hayden v. Twer-ton* (3), that there would have been no actual possession of the rent-charge to entitle the claimant to be registered.” The case of *Heelis v.*

(1) 2 C. B. 217; 15 L. J. (C.P.) 155.

(2) 18 C. B. (N.S.) 90; 24 L. J. (C.P.) 88.
(C.P.) 88. *11 June 1872*

(3) 4 C. B. 1; 16 L. J. (C.P.) 88.

(4) Hop. & Ph. at p. 198.

Blain (1) certainly may be called a refined decision in favour of the franchise. It was there held that "actual possession" in s. 26 of the Reform Act of 1832 is satisfied by the execution of a conveyance to uses of a rent-charge, although no part of the rent has been received. The question now is whether this was or was not a grant operating by virtue of the Statute of Uses. I am clearly of opinion that it was not. The Statute of Uses has no application where the grant is to three persons and their heirs, habendum to the same three, their heirs and assigns, to the use of the same three, their heirs and assigns for ever, as tenants in common; because they do not satisfy the words of s. 1, they not being seised "to the use of some other person or persons," but to the use of themselves. It is said here that the Statute of Uses applies, because they are by the first part of the habendum joint-tenants, and by the limitation of uses they take as tenants in common. I will not say that that is an absurd argument, because it is at least as plausible an argument as some which have prevailed in cases of this sort. But I agree with the rest of the Court that this case is not within *Heelis v. Blain* (1), and that it is within *Murray v. Thorniley* (2) and *Hayden v. Twerton* (3), and therefore that our judgment should be for the appellant.

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Decision reversed. (4)

Attorney for appellant: *John Elliott Fox, for Robert Evans, Ashton-under-Lyne.*

Attorneys for respondent: *Rickards & Walker, for J. W. Mellor, Oldham.*

(1) 18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88. *John A. B.*

(2) 2 C. B. 217; 15 L. J. (C.P.) (3) 4 C. B. 1; 16 L. J. (C.P.) 88.

155.

(4) See the next case.

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May 2.

WEBSTER, APPELLANT; THE OVERSEERS OF ASHTON-UNDER-LYNE,
RESPONDENTS.

HADFIELD'S CASE.

Parliament—County Vote—Rent-charge—“Actual Possession” under 2 Wm. 4, c. 45, s. 26—Statute of Uses, 27 Hen. 8, c. 10—Power of Court to review its own Decisions—6 Vict. c. 18, s. 66, Construction of.

By a deed executed on the 29th of January, 1872, which operated under the Statute of Uses, an annual rent-charge of 35*l.* 14*s.* was granted to the use of seventeen persons in fee as tenants in common, to be payable by equal half-yearly payments on the 29th of January and the 29th of July. The first payment, payable on the 29th of July, 1872, was paid on the 30th of July:—

Held, that, as the grant operated under the Statute of Uses, the case came within the decision in *Heelis v. Blain* (18 C. B. (N. S.) 90; 34 L. J. (C.P.) 88) and that on the authority of that case the grantees, by force of the Statute of Uses, had been in “actual possession” of the rent-charge from the date of the grant, within s. 26 of 2 Wm. 4, c. 45, and were therefore entitled to be upon the register of voters for the year 1872.

Semble, that the Court, though a Court of ultimate appeal in registration cases, will review its previous decisions, and overrule them if clearly demonstrated to be erroneous.

Semble, that s. 66, of 6 Vict. c. 18, makes the decision of the Court final and conclusive only in the case in which it is given.

APPEAL from the revising barrister for the south-eastern division of the county of Lancaster.

Joseph Hadfield, on the list of claimants, was objected to. The claim of Hadfield was in respect of “one-seventeenth share of rent-charge issuing from freehold land and houses;” and in the fourth column “Hugh Mason” was named as owner.

By an indenture, dated the 29th of January, 1872, and made between Hugh Mason, of the first part, Joseph Hadfield, R. T. Weild, Henry Bardsley, and fourteen other persons, of the second part, and the said Joseph Hadfield and R. T. Weild of the third part, Hugh Mason, being seised in fee-simple in possession of certain lands and messuages in Ashton-under-Lyne, granted unto Joseph Hadfield and R. T. Weild, the parties thereto of the third part, and their heirs, one perpetual yearly rent-charge of 35*l.* 14*s.*, to be payable, clear of all deductions whatsoever except property or income-tax, by equal half-yearly payments on the 29th of July and the 29th of January in each year, the first payment to be

(1) See p. 75.18

due on the 29th of July then next, and to be issuing from and out of and charged and chargeable upon the said lands. To hold the said rent-charge unto the parties thereto of the third part and their heirs for ever, with covenant for payment and a power of distress in case of non-payment, "To the use of the said parties hereto of the second part, and their respective heirs and assigns, as tenants in common, and not as joint-tenants."

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The moiety of the rent-charge of 35*l.* 14*s.* (less property-tax) due on the 29th of July was paid on the 30th of July, 1872, by Hugh Mason to Hadfield and Weild, pursuant to the deed, and divided equally by them amongst the parties to the deed of the second part, except that the share of one of them was paid to another who had been substituted for him.

It was contended by the objector that Joseph Hadfield had not been in the "actual possession" of the rent-charge for six calendar months previous to the 31st of July, 1872, as required by 2 Wm. 4, c. 45, s. 26.

It was contended by the party objected to, upon the authority of *Heelis v. Blain* (1), that the Statute of Uses, 27 Hen. 8, c. 10, operated to give to the person objected to and the other persons parties to the indenture of the second part, the actual possession of the rent-charge on the execution of the indenture.

The revising barrister held, upon the authority of that case, that the claim was good.

Herschell, Q.C., for the appellant, admitted that the grant operated under the Statute of Uses, there being parties named in the declaration of uses other than those to whom the grant was made, and that therefore the case was clearly within the decision of this Court in *Heelis v. Blain*. (1) But he contended that that case was wrongly decided, and ought to be overruled. All the authorities upon the subject were not brought to the attention of the Court, and all the consequences involved in it were not foreseen; and the re-consideration of it would not interfere with any vested interests. "Actual possession," in s. 26 of 2 Wm. 4, c. 45, as regards land, means physical possession, and, as regards a rent-charge, the receipt of the rent. Some confusion in the earlier

(1) 18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88.

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cases has arisen from not observing that the writ of assize and the action of trespass stand upon different foundations,—actual physical possession being necessary to the maintenance of the latter, whereas legal seisin was enough for the former. The following authorities were cited and commented on:—Littleton's *Tenures*, p. 366; Bacon's *Readings on the Statute of Uses*, pp. 38, 56; Gilbert on *Uses*, 3rd. ed. pp. 133, 185, 228; Comyns's *Digest*, *Trespass* (B. 3), *Uses* (I.); Roscoe on *Real Actions*, p. 662; Bridgman's *Judgments*, pp. 220, 495; Fonblanque on *Equity*, vol. 2, p. 12; Williams on *Real Property*, 8th ed. p. 176; *Mallory's Case* (1); *Green v. Wallwin* (2); *Lutwich v. Mitton* (3); *Geary v. Bearcroft* (4); *Anelay v. Lewis*. (5) Reference was also made to the effect of the Statute of Uses upon cases under the Statute of Limitations, 3 & 4 Wm. 4, c. 27.

John W. Mellor (*Kenelm Digby* with him), for the respondents, submitted that by force of the Statute of Uses the claimant came into actual possession of the rent-charge immediately upon the execution of the grant (6), and that, consequently, it was immaterial that there had been no payment of the rent until the 30th of July in the qualifying year. There cannot be manual possession of a rent-charge, and the receipt of the rent was only material so far as it worked an attornment, which was rendered unnecessary by the Statute of Uses. The case of *Heelis v. Blain* (7) was rightly decided, and, having been acted upon for so many years, and standing unimpeached, notwithstanding subsequent legislation on the subject of the franchise, was binding on the Court, if not absolutely, at least so far that it ought not to be overturned upon light grounds. With respect to the power of a Court of ultimate appeal to correct or modify its previous decisions, the argument was as follows:—In *Attorney-General v. Dean and Canons of Windsor* (8), Lord Campbell, C., says: "That most learned and able judge, the present Master of the Rolls, points out a decision

(1) 5 Co. Rep. 111. b.

(2) Noy, 73.

(3) Cro. Jac. 604.

(4) Carter, 57, 66.

(5) 17 C. B. 316; 25 L. J. (C.P.)

121. 2 Jm NS. 164.

(6) See the statute set out, ante, p. 282.

(7) 18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88. 11 Jm NS. 2570

(8) 8 H. L. Cas. 369, at p. 391.

6 Jm NS. 833-4,

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of this House (1), which he says he thinks clearly governs the present case; adding (2): ‘The decisions of the House of Lords are binding on me, and upon all Courts *except itself*.’ I feel it my duty to say that I think this expression is incorrect. By the constitution of this United Kingdom, the House of Lords is the Court of appeal in the last resort, and its decisions are authoritative and conclusive declarations of the existing state of the law, and are binding upon itself when sitting judicially, as much as upon all inferior tribunals. The observations made by members of the House, whether law members or lay members, beyond the ratio decidendi which is propounded and acted upon in giving judgment, although they may be entitled to respect, are only to be followed in so far as they may be considered agreeable to sound reason and to prior authorities. But the doctrine on which the judgment of the House is founded must be universally taken for law, and can only be altered by Act of Parliament.” That was followed in *Beamish v. Beamish* (3), where Lord Campbell, C., says: “If it were competent to me, I would now ask your Lordships to re-consider the doctrine laid down in *Reg. v. Millis* (4), &c. But it is my duty to say that your Lordships are bound by this decision as if it had been pronounced nemine dissentiente, and that the rule of law that your Lordships lay down as the ground of your judgment, sitting judicially as the last and supreme Court of appeal for this empire, must be taken for law till altered by an Act of Parliament agreed to by the Commons and the Crown as well as by your Lordships. The law laid down as your ratio decidendi, being clearly binding on all inferior tribunals, and on all the rest of the Queen’s subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law, and legislating by its own separate authority.” In *Mersey Docks and Harbour Board v. Gibbs* (5), Lord Wensleydale says: “If this case depended only on the decision of the Courts below, I should feel great difficulty indeed in supporting the decision of the Court

(1) *Beverley v. The Attorney-General*, 6 H. L. Cas. 310. *8 Jun 2570, 71*

(2) 24 Beav. at p. 115. *4 Jun 2571, 72*

(3) 9 H. L. Cas. 274, 333. *8 Jun 2570, 71*

(4) 10 Clark & Fin. 534.

(5) Law Rep. 1 H. L. 93, 125. *12 Jun 2571, 72*

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of Exchequer Chamber. But I cannot help thinking that the decisions of your Lordships' House, which are no doubt binding upon your Lordships and all inferior tribunals, have gone so far that they have concluded the question, and ought to be considered as deciding that the appellants are responsible." So, in the *Willes Claim of Peerage* (1), an attempt was made to claim finality for a decision of the Committee for Privileges. But Lord Chelmsford said (2): "I cannot agree that the determination of one Committee for Privileges must be a binding and conclusive authority upon another. It may be conceded that an opinion expressed by those who are exercising a quasi-judicial function will always be entitled to respect and consideration; but it cannot claim the authority of a final decision upon any particular point of law, in the same manner as a judicial determination of the House sitting as a tribunal of ultimate appeal from the judgments and decrees of the Courts of law and equity." And Lord Colonsay said (3): "It was strongly pressed upon us that the decision in the *Devon Case* (4) is a precedent which must be followed in all future cases. I think that argument was pressed rather too far. While I think that such a precedent is not to be lightly disregarded, but, on the contrary, is entitled to the greatest consideration and respect, I do not look upon it in the same light as a decision of the House sitting as a Court of law. It is, no doubt, when accepted by the House, conclusive in the particular case, but, for the reasons assigned by my noble and learned friend, it is not binding on future committees or on the House in all future cases. The noble and learned lords who pronounced that decision were not making a rule for any other case; and, even if they had thought otherwise, which I do not think they did, I could not have concurred in the opinion that an error (if it was an error) into which one Committee for Privileges had fallen was to be perpetuated, so as to affect all future cases." These cases shew that this Court, sitting as it does as a Court of ultimate appeal in these matters, is conclusively bound by a former decision which is precisely in point.

[BOVILL, C.J. The Queen's Bench is the Court of ultimate

(1) Law Rep. 4 H. L. 126.

(2) Law Rep. 4 H. L. at p. 147.

(3) Law Rep. 4 H. L. at p. 169.

(4) 2 Dow. & Cl. 200.

appeal in sessions cases, and yet they have constantly overruled former decisions. Suppose an omission to refer in argument to an Act of Parliament which was conclusive of the matter, and the decision were consequently pronounced in opposition to the express enactment, could it be said that the Court must nevertheless persist in upholding their erroneous judgment?

GROVE, J. The House of Lords itself might forget a statute.]

In such a case it would, as Lord Campbell says, in *Beamish v. Beamish* (1), be a misfortune, which could only be remedied by the Legislature itself.

[BOVILL, C.J. This Court has on numerous occasions departed from prior decisions. The judgment in *Cook v. Humber* (2) was inconsistent with several earlier cases. *Heartley v. Banks* (3) and *Freeman v. Gainsford* (4) are virtually overruled by *Roberts v. Percival*. (5) And *Copland v. Bartlett* (6) and *Beamish v. Stoke* (7) are also virtually, if not in terms, overruled by *Rollleston v. Cope*. (8)]

Section 66 of 6 Vict. c. 18 enacts "that every judgment or decision of the Court shall be final and conclusive in the case upon the point of law adjudicated upon, and shall be binding upon every committee of the House of Commons appointed for the trial of any petition complaining of an undue election or return of any member or members to serve in Parliament."

[BRETT, J. Final and conclusive *in the case*. That does not much fortify the argument.]

Upon the principal question the following authorities were referred to:—Gilbert on Uses, 88; 2 Sanders on Uses, 55; Com. Dig. *Attornment* (A.); 1 Cruise, Dig. 386; Gale on Easements, 3rd. ed. 23; *Barker v. Keate* (9); *Anonymous* (10); *Lutwich v. Mitton* (11); *Cook v. Herle* (12); *Murray v. Thorniley* (13); *Hayden v. Twerton*. (14)

(1) 9 H. L. Cas. at p. 274.

(2) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 51. *8 H. L. 698*

(3) 5 C. B. (N.S.) 40; 28 L. J. (C.P.) 144. *5 H. L. 492*

(4) 11 C. B. (N.S.) 68; 34 L. J. (C.P.) 95. *11 H. L. 116*

(5) 18 C. B. (N.S.) 36; 34 L. J. (C.P.) 84. *11 H. L. 40*

(6) 6 C. B. 18; 15 L. J. (C.P.) 50.

(7) 11 C. B. 29; 21 L. J. (C.P.) 9.

(8) Law Rep. 6 C. P. 292.

(9) 1 Mod. 263; 2 Mod. 249.

(10) Cro. Eliz. 46.

(11) Cro. Jac. 604.

(12) 2 Mod. 138.

(13) 2 C.B. 217; 15 L. J. (C.P.) 155.

(14) 4 C. B. 1; 16 L. J. (C.P.) 88.

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BOVILL, C.J. In this case the revising barrister allowed the vote of Joseph Hadfield, although there had been no actual perception by him of the rent-charge in respect of which he claimed, for the period mentioned in the Act of Parliament. The contention on the part of the respondents was that Hadfield was entitled to be registered, because the grant of the rent-charge operating under the Statute of Uses, 27 Hen. 8, c. 10, he was, by force of that statute, as soon as the grant was made, in actual possession within the meaning of s. 26 of 2 Wm. 4, c. 45. That section enacts that no person shall be registered as a county voter in any year in respect of his estate or interest in any lands or tenements, as a freeholder, &c., unless he shall have been "in the *actual possession* thereof, or in the receipt of the rents and profits thereof" for his own use for six calendar months at least next previous to the last day of July in such year. A rent-charge is a "tenement" within that section. The cases of *Murray v. Thorniley* (1) and *Hayden v. Twerton* (2) decided that "actual possession" in that section means a possession in *fact*, as contradistinguished from a possession in *law*, and therefore that the grantee of a rent-charge was not entitled to be registered unless he had been in the actual receipt of it for six months before the last day of July. It was, however, decided in *Heelis v. Blain* (3), that, where the grant operates by force of the Statute of Uses, the grantee is in actual possession of the rent-charge as soon as the grant is executed. We were strongly pressed in the course of the very able argument of Mr. Herschell to hold that the decision in *Heelis v. Blain* (3) was not warranted in point of law; and I must confess he has shewn many reasons which, if the matter had been *res integra*, might have induced me to come to a conclusion different from that at which the Court arrived in that case. Upon the first view, the statute certainly does seem to point to some actual possession in addition to the grant itself; but *Heelis v. Blain* (3) decided that actual perception of the rent charge was not necessary where the grant was one which took effect by virtue of the Statute of Uses. The question we have now to decide is, whether we are to abide by *Heelis v. Blain* (3) or to lay down a different rule.

(1) 2 C. B. 217; 15 L. J. (C. P.) 155.

(2) 4 C. B. 1; 16 L. J. (C. P.) 88.

(3) 18 C. B. (N.S.) 90; 34 L. J. (C. P.) 88. *11 June 1878*

On the part of the appellant it was contended that, inasmuch as there is no appeal from the decisions of this Court in matters relating to the registration of voters, we ought not to hold ourselves bound by a previous case which can be shewn to have been erroneously decided. On the other hand, it was insisted that, this Court being upon the particular subject a Court of ultimate appeal, its decisions are final and ought not to be overruled. Unfortunately the Courts are frequently placed in considerable difficulty in determining what is the true meaning of a statute. From the mode in which Acts of Parliament are framed and altered in passing through the Houses of Parliament, they must necessarily be sometimes difficult to interpret; and, especially in the exercise of a newly-created jurisdiction, fresh circumstances will from time to time arise which render it next to impossible to preserve strict uniformity of decision. In *Rolleston v. Cope* (1) the Court found itself compelled to elect by which of two previous cases it should hold itself bound.

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I should be sorry to lay it down as a rule that this Court cannot depart from a previous decision, especially where it can be shewn that there has been an omission to cite an earlier authority, or a clear mistake in its application; and I do not concede that we are absolutely bound to adhere to our decisions in the same manner as the House of Lords considers itself bound. There is no parallel between the two cases. The decisions of the House of Lords as the supreme Court and Court of ultimate appeal, are decisions upon the law not pronounced simply by lawyers, but by the whole House of Peers; for it is only in modern times that they are pronounced by a select number of the members of the House. The law seems, from the cases referred to, to be clearly settled that decisions of the Lords are final and binding on the House itself in future cases. That principle, however, has never been applied to the superior Courts of Westminster in cases where they have a peculiar jurisdiction; for instance, in the Queen's Bench on appeals from quarter sessions, in the Exchequer in matters of revenue, and in this Court on appeals under the Registration Acts, and in matters arising under the Railway and Canal Traffic Act. Wherever a new jurisdiction is given to the Courts, some time must necessarily elapse before

(1) Law Rep. 6 C. P. 292.

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the law can be settled; and great inconvenience and mischief would result in such cases, where there is no appeal, if the Courts were absolutely bound by their decisions, though manifestly erroneous. I, therefore, hold that we are fully at liberty to reconsider any decision which may have been come to upon these Acts of Parliament, and do not consider that we are at all concluded by the case of *Heelis v. Blain*. (1) But it seems to me that we ought to act upon it until it has most clearly been made out to be wrong. Mr. Herschell undertook to shew that it could not be supported in point of law, and that the adoption of it would lead to great inconvenience. Now, if the question were one of general importance, and the decision of it might affect titles or the practice of conveyancers, I should have thought it ought to be approached with great caution. But all that we have on the present occasion to consider is what is the effect of the Statute of Uses as applicable to the interpretation of s. 26 of the Reform Act of 1832. *Heelis v. Blain* (1) was a decision upon that point alone. The question was, whether the grantee of a rent-charge under the Statute of Uses could be said to be in actual possession of the rent-charge as soon as the deed was executed, within the intent and meaning of s. 26. The Court were of opinion that he could. In their judgment they rely on *Anon.* (2), Bacon's Readings on the Statute of Uses, Butler's Note to Co. Litt. 315. a., and Burton's Compendium, § 1116. But unfortunately there are several other authorities cited by Mr. Herschell which were not brought to the attention of the Court. It would, of course, have been more satisfactory if those authorities had been fully considered upon that occasion; and I must say for myself that the argument of Mr. Herschell has considerably shaken my confidence in the decision of *Heelis v. Blain* (1). But, to warrant us in departing from that decision, it was necessary, not merely to raise a doubt, but to shew conclusively that it was a wrong decision. Has, then, the argument gone that length? I am of opinion that it has not. The Statute of Uses has always been considered to give a possession which for some purposes was to be treated as actual possession. The most ordinary case of constructive actual possession under the statute was the case of a lease and release.

(1) 18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88.

(2) Cro. Eliz. 46.

Treating of this description of conveyance, which was resorted to for the purpose of evading the Statute of Uses, Mr. Preston, 2 Preston on Conveyancing, 219, says: "By the common law, and till the statute for the amendment of the law (1), attornment of the particular tenant was essential to the validity of the grant; and the tenant might in many cases withhold attornment, or the grantor or grantee might die before attornment had taken place. Each of these events would defeat the grant; for, unless attornment was obtained in the lifetime of the grantor and also of the grantee, the grant became inoperative and failed of effect. Besides, there was a notoriety attending livery or attornment which must have been distressing in transactions of delicacy which required secrecy; and, in giving the history of this assurance it is said this conveyance was at first only purposely contrived by Serjeant Francis Moore at the request of the Lord Norris, to the end that some of his kindred or near relations should not take notice by any search of public records what conveyance or settlement he should make of his estate." In *Barker v. Keate* (2), also, it is stated by Lord C. J. North that Mr. Serjeant Moore was the inventor of this mode of assurance. "The inconveniences thus experienced naturally led men of extensive practice to contrive some mode of conveyance by which the estate might be transferred immediately and without any interval from one man to another, although both parties were at a distance from the lands, and without even the necessity of their meeting for the purpose, or their giving any written authority to deliver or receive the seisin." Noy, who has always been considered a very high authority, says, Noy's Maxims, 289: "The usual conveyance at common law was by feoffment, to which livery and seisin were necessary, the possession being thereby given to the feoffee; but, if there were a tenant in possession, and so livery could not be made, then the reversion was granted, and the particular tenant always attorned to the grantee; and upon the same reason it was that afterwards a lease and release were held a good conveyance to pass an estate; but at that time it was made no question but that the lessee was to be in actual possession, by means of an actual entry on the lands, before the release was made. Afterwards,

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(1) 4 Ann. c. 16, s. 9.

(2) 2 Mod. at p. 252.

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when uses became frequent, and settlements to uses very common, to prevent the many inconveniences thereby introduced, the statute of 27 Hen. 8, c. 10, was made, by which the *use* was united to the *possession*; and after this statute it became an opinion that, if a lease for years were made upon a valuable consideration by the words 'demise, let, or grant,' a release might operate upon it without an actual entry of the lessee, because the statute executed the lease, and raised a use presently to the lessee." Further, at p. 228, Mr. Preston says: "The bargain and sale passed an use, and the use was executed by the stat. of 27 Hen. 8, for transferring uses into possession, and the use became a *term*, in other words, an *actual estate*, and the bargainee was, without entry, precisely in the same circumstances as a lessee at the common law was after entry or attornment, with the difference only that a bargainee could not maintain trespass (1) for any injury to the possession until he had actually entered; but this was a circumstance which, though it affected the remedy for injuries to the possession, was not of any importance in the consideration of the principles on which the doctrine of releases in enlargement of a vested estate for years depended."

In *Barker v. Keat* (2), in the 29 Car. 2, a special verdict referred to the Court whether there was a good tenant to the præcipe or not, which was made by a bargain and sale, but no money paid, nor any rent reserved but that of a peppercorn, to be paid at the end of six months, upon demand, and the release and grant of the reversion thereupon was only "for divers good considerations." The question was, "If this lease, upon which no rent was reserved but that of a peppercorn, be executed by the Statute 27 Hen. 8, c. 10, of Uses, or not. If it be, then there is no need of the entry of the lessee, for the statute will put him in actual possession, and then the inheritance, by the release or grant of the reversion, will pass. But, if this lease be not within the statute, because no use can be raised for want of a consideration, then it must be a conveyance at the common law, and so the lessee ought to make an actual entry, as was always usual before the making of the statute." And the judgment of the Court was

(1) Citing *Lutwich v. Mitton*, Cro. Jac. 604; *Green v. Wallwin*, Noy. 73,

(2) 2 Mod. 249,

"that the word 'grant' in the lease will make the land pass by way of use; that the reservation of a peppercorn was a good consideration to raise an use to support a common recovery; that this lease being within the Statute of Uses, there was no need of an *actual* entry to make the lessee capable of the release, for, by virtue of the statute, he shall be adjudged to be in actual possession, and so a good tenant to the præcipe." In all the ordinary forms of conveyance by lease and release since that case, the bargainee under the lease for a year has always been treated and described as being in actual possession. Therefore, here were two purposes for which, during a period of two or three centuries, the statute has been held to give the *actual possession*. It has been held that the statute did not give such a possession as to enable the grantee to maintain trespass at the common law: *Geary v. Bearcroft* (1); but it has been held that he might maintain an assize: *Anonymous*. (2)

If we were to go through and attempt to reconcile the subtleties of this branch of the law, we should be embarking on a task which is manifestly hopeless. For some purposes the statute does, and for others it does not, give the actual possession. No case has been found which shews distinctly what is the effect of the statute for conveyancing purposes or the vesting of estates. Under these circumstances, the question arises whether we can clearly arrive at the conclusion that the Court in *Heelis v. Blain* (3) were wrong in holding that the Statute of Uses did give the grantee the "actual possession" of the rent-charge within the meaning of s. 26 of the Reform Act of 1832. Probably, if the matter had been *res nova*, I should have held that actual possession meant what the words import. But, under the circumstances, I do not find sufficient reasons for saying that a decision which has been acted upon and has regulated the franchise for so many years, and which has not been interfered with by the legislature who have had the subject before them, and have legislated upon it since that decision, ought now to be departed from.

Upon the whole, therefore, I am content to abide by the deci-

(1) Carter, 57, 66.

(2) Cro. Eliz. 46.

(3) 18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88. *Wm. H. W.*

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sion in *Heelis v. Blain* (1), and to hold that this appeal ought to be dismissed, but without costs.

BRETT, J. The question is whether the claimant had been in "actual possession" of this rent-charge for the six months prescribed by s. 26 of 2 Wm. 4, c. 45. It is said that he had, because by force of the Statute of Uses he was in actual possession from the execution of the grant; and, unless we are prepared to overrule *Heelis v. Blain* (1), that contention is right. It has therefore been urged on the part of the appellant that that case ought to be overruled. On the other hand, it has been contended on the part of the respondents, that this Court cannot overrule its former decision; and this upon two grounds, first, because it is the Court of ultimate appeal with reference to this part of its jurisdiction, and, secondly, by reason of s. 66 of 6 Vict. c. 18, which enacts that every judgment or decision of the Court "shall be final and conclusive in the case upon the point of law adjudicated upon, and shall be binding upon every committee of the House of Commons appointed for the trial of any petition complaining of an undue election or return of any member to serve in Parliament." As to the first ground, cases have been referred to for the purpose of shewing that the House of Lords will not overrule its own decisions. I doubt very much whether, if it were shewn clearly that a former decision proceeded upon erroneous principles, it would not be competent to the House in another case to reconsider the matter. But, be that as it may, I think this Court is bound to administer the law as it exists at the time when the particular judgment is delivered. I abide by what I said in *Orme's Case* (2), viz. that this Court is bound to adhere loyally to former decisions unless clearly satisfied that they are wrong. But, if we are satisfied that a former decision is clearly wrong, and not warranted by law, we ought not blindly to follow it: and I am satisfied that the Court has acted upon that principle on more than one occasion. Neither do I think that the words of s. 66 help the respondent's argument. The judgment is to be final in the case in which it is given.

(1) 18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88.

(2) Ante, at p. 299.

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The case of *Heelis v. Blain* (1) decides that the phrase "actual possession" in s. 26 of the Reform Act of 1832 must have the same meaning ascribed to it as the word "possession" in the Statute of Uses. The authorities to which my Lord has referred shew by a continuous and general interpretation of conveyancers and courts that the possession spoken of in the Statute of Uses is to be deemed to be an actual possession; and that that is so not only in the case of a rent, but also in the case of land. In the case of land I see no great difficulty. The actual possession deemed to be given by the Statute of Uses for the purpose of the conveyance may be shewn by some visible act to have been got rid of, or to have ceased immediately, or at some time within six months. In the case of a rent-charge, if the rent were assigned within the six months, the right to be registered would be visibly gone. It may be that the mere abstaining from receiving the rent when due would be evidence of the grantees having ceased to be possessed. But it seems to me that, the actual possession of the rent-charge being once in the grantee by force of the Statute of Uses, it must from its nature be taken to remain in him until some rent be due and be not received, or until he has done some act to divest it. It seems to me that that is the substantial ground upon which *Heelis v. Blain* (1) proceeded; I think it is impossible to say that it is clearly wrong, and so far from saying that, paying the judges who decided that case the deference which is due to their great learning and ability, I am wholly unprepared to say that the decision was in fact wrong. I admit that this is an anomalous decision with regard to the Franchise Acts; but that is the result of the construction which has for so many years been put by conveyancers upon the Statute of Uses, and must remain until the legislature interferes. The decision of the revising barrister must be affirmed.

GROVE, J. I am of the same opinion, though I must candidly admit that, if the question now came before me for the first time, reading the 18th and 26th sections of the Reform Act together, I should have inclined to hold that "actual possession" meant something which was capable of demonstration, and not a mere parch-

(1) 18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88.

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ment title. In *Murray v. Thorniley* (1) Tindal, C.J., in delivering the judgment of the Court, says: "The question turns upon the meaning of the words 'actual possession;' and we think those words mean a possession in fact, as contradistinguished from a possession in law; and that as the possession in fact of a rent-charge must be the actual manual receipt of the rent itself, or some part of it, or of something in lieu of it, so there could be no such possession in fact in this case, where the first payment of the rent did not become due until after the expiration of the month of July, and where nothing whatever took place but the mere execution of the deed." And, after referring to Littleton, § 235, Com. Dig. *Seisin* (C.) and (D.), and Co. Litt. 15. b., the learned Chief Justice proceeds: "The actual possession of rent being, therefore, a well-known legal phrase or expression, the legislature cannot be taken to have used it in any other than such well-known sense, that is, as contradistinguished from such possession in law, or right to the rent-charge, as the bare delivery of the deed of grant would confer." If that learned judge had had before him these two cases which have been discussed before as at such great length, he would hardly have used the expression "well-known." The authorities shew that "actual possession" has been used in a variety of senses. But for the subtlety of conveyancers, the spirit and the words of the Statute of Uses would seem to be clear and intelligible. The object of that statute was to prevent there being an apparent owner put forward, whilst a real and beneficial owner remained behind. We have seen what ingenuity was exercised to defeat that object. I cannot therefore say that the decision in *Heelis v. Blain* (2) was wrong, seeing that the expression "actual possession" has on various occasions received a legal construction which is consistent with it. I agree also that the Court should use the utmost circumspection in overruling a case which has been acted upon for several years, and especially after subsequent legislation upon the subject, which has left the decision untouched. There should be overwhelming reasons for the adoption of such a course. The words of s. 66 of 6 Vict. c. 18, do not mean that the decisions of this Court on these appeals shall be final and con-

(1) 2 C. B. at pp. 223, 4.

(2) 18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88. *11 Jun 1875. 10*

clusive to all intents and purposes, but merely that the judgment shall be final and conclusive in the particular case.

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DENMAN, J. I am of the same opinion. The great question which has been argued before us is, what is the meaning of the words "actual possession" in s. 26 of the Reform Act, when applied to a rent-charge created by a deed operating under the Statute of Uses. I agree that "actual possession" in this section means a possession in fact; yet there are many cases in the books in which "actual" has been held to mean "constructive," as in *Gladstone v. Padwick* (1), where a seizure under a fi. fa. of goods of the debtor in a mansion-house was held to be an actual seizure of goods of the debtor at a farm-house in his occupation about a mile distant, within the meaning of 19 & 20 Vict. c. 97, s. 1. Where we are dealing with a rent-charge, which is an incorporeal hereditament, actual possession can hardly mean actual manual possession. That being so, we have here to guide us a case decided upon this very statute, viz. *Heelis v. Blain*. (2) Not only is that a decision upon the very point, but it was come to before the last legislation upon the subject of the franchise. The legislature must be assumed to have been cognizant of it; and we must hold ourselves bound by it unless conclusively satisfied that it is wrong. Now, I must say it is by no means clear to my mind, notwithstanding the able argument of Mr. Herschell, that, if I had had to decide the point now for the first time, I should not have decided it in the same way. That being so, I do not think the case is one which we ought to decline to act upon.

Decision affirmed.

Attorney for appellant: *John Elliott Fox, for Robert Evans, Ashton-under-Lyne.*

Attorneys for respondents: *Rickards & Walker, for W. J. Mellor, Oldham.*

(1) Law Rep. 6 Ex. 203.

(2) 18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88

Wm. H. M.

END OF REGISTRATION CASES

AND OF

HILARY TERM, 1873.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

EASTER TERM, XXXVI VICTORIA.

Applied. HARDING v. PRICE.
[1948] 1 K. B. 695

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NICHOLS, APPELLANT; HALL, RESPONDENT.

April 22.

Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 75—The Animals Order, 1871, s. 19—Neglect to give notice of Animals' being diseased—Knowledge.

By the Animals Order, 1871, made by the Privy Council under the 75th section of the Contagious Diseases (Animals) Act, 1869, it is provided that every person having in his possession or under his charge an animal affected with a contagious or infectious disease shall, "with all practicable speed, give notice to a police constable of the fact of the animal being so affected":—

Held, that in order to convict the person in possession or charge of a diseased animal of an offence against the order, it must be proved that he was aware of the fact that the animal was diseased.

CASE stated by Justices of Buckinghamshire under 20 & 21 Vict. c. 43, the facts of which were in substance as follows:

At the petty sessions holden at Newport Pagnell, in the county of Buckingham, on the 2nd of October, 1872, an information which had been preferred by the respondent, an inspector of police at

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Newport Pagnell, against the appellant, a cattle dealer, came on for hearing. The information stated, that the appellant having in his possession certain animals, to wit five head of cattle affected with a contagious or infectious disorder called the foot and mouth disease, did neglect to give notice with all practicable speed to a police constable of the fact of the said animals being so affected, contrary to the provisions of the General Order of the Lords of the Privy Council relative to contagious and infectious diseases among animals. (1)

It was proved at the hearing, by the evidence of the respondent, that on the 3rd of August last the respondent saw in a field in the occupation of the appellant five animals apparently suffering from the "foot and mouth complaint;" and that the appellant had not given any notice to the respondent that the said animals were so suffering. On the 7th of August, the animals, which still remained in the same field, were examined by a veterinary surgeon, and found to be suffering from foot and mouth disease.

It was contended on the part of the appellant, that before he could be convicted of the offence alleged, it must be proved that the said animals were so affected with the foot and mouth disease to his knowledge, and that there was no evidence adduced to prove that. (2)

The justices overruled the objection and convicted the appellant. It was stated in the case that the justices found as a fact that the animals were on the 7th of August in the possession of the appel-

(1) The order relating to giving notice of animals being diseased, is the order of the 20th of December, 1871, called the Animals Order, 1871, the 19th section of which provides as follows: "Every person having in his possession, or under his charge, an animal (including a horse) affected with a contagious or infectious disease, shall observe the following rules:—

"(1.) He shall, as far as practicable, keep such animal separate from animals not so affected.

"(2.) He shall, with all practicable speed, give notice to a police constable

of the fact of the animal being so affected. Such police constable shall forthwith give notice thereof to the inspector of the local authority, who shall forthwith report the same to the local authority, and (except in the case of foot and mouth disease) to the Privy Council."

(2) It was likewise contended, that there was no sufficient proof that notice had not been given of the fact of the animals being diseased; but it became unnecessary, as will be seen from the judgment, to deal with this point.

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lant, and that they were suffering with a contagious or infectious disease called the foot and mouth disease, and that the justices held it unnecessary to prove that the appellant knew that the animals were so affected, but that there was no evidence before them to shew that the appellant knew that the said animals were so affected until he was served with a summons for the alleged offence.

The question for the Court was whether, in order to convict the appellant of the said offence it was sufficient to prove that the said animals were affected as aforesaid, and that the appellant did not give notice, without giving evidence that the appellant knew that they were so affected.

Graham (*Raymond* with him), for the appellant. The words "with all practicable speed" clearly shew that the order contemplates knowledge on the part of the person offending. How can it be practicable that he should give notice before he knows?

He cited *Emmerton v. Mathews* (1); *Core v. James*. (2)

[KEATING, J. It appears to me that on the case as stated we must take it that the appellant had no knowledge of the fact that the animals were affected.]

Merewether for the respondent. The object of the statute and order is to prevent the spread of cattle disease, and if the construction suggested on behalf of the appellant is correct the provision for that object will become, practically speaking, ineffective. It is extremely difficult to prove knowledge in such cases. A farmer has only to keep out of the way if he has beasts which are suspected, and neglect to avail himself of the means of knowledge, and he cannot be convicted. Suppose the farmer entrusts the care of the beasts to a bailiff and is not personally cognizant of anything concerning them—

[HONYMAN, J. Then the bailiff will be liable.]

In *Core v. James* (2) it was clearly the opinion of Lush J. that if the servant had had guilty knowledge the master would have been liable; but there neither master nor servant knew. Here the only question intended to be submitted was whether the mere

(1) 7 H. & N. 586; 31 L. J. (Ex.) 139.

(2) Law Rep. 7 Q. B. 135.

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fact that the master was ignorant is sufficient to prevent there being any offence against the order by him. It is obvious that somebody in charge of the beasts must have known, since they were apparently suffering from the disease as early as the 3rd of August.

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[HONYMAN, J. The case says nothing about the knowledge of any bailiff or servant of the appellant. The master might, perhaps, be convicted for the guilty act of his bailiff. Possibly the justices might not have been far wrong if on the facts of the case they had found that the appellant did know that the beasts were affected, but they have not found knowledge in anybody. The bare point raised for us is, whether knowledge is a necessary ingredient in the offence.]

If it appears that the beasts were suffering from the disease, the person in possession ought to know that such was the fact, and is to be treated as knowing.

The words "as soon as practicable" only refer to such considerations as the distance of the farm from the place where the police constable may be stationed, and similar considerations; not to any question of knowledge.

[HONYMAN, J. Can you put a different construction on the words here from that which must be put on them in the previous part of the clause? Clearly the person in possession could not be bound to separate the diseased beasts from others until he knew they were diseased.]

If knowledge must be shewn, a defendant may be entitled to say, though the beasts presented unusual symptoms, I did not absolutely know that they were suffering from foot and mouth disease, because the symptoms were also consistent with some other disorder which is very difficult to distinguish from foot and mouth disease, but which is not contagious; and endless difficulties and uncertainties would be thrown in the way of the working of the order.

KEATING, J. I am of opinion that this conviction must be quashed. The question submitted is whether, in order to convict the appellant, it was sufficient to prove that the animals were affected by a contagious disease, and that the appellant gave no

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notice of their being so affected without evidence that he knew of their being so affected. The 75th section of the Contagious Diseases (Animals) Act provides that the Privy Council may make such orders as they think expedient, for, among other purposes, "requiring notice of the appearance of any such disease among animals." And it is further provided by the 103rd section, that "if any person acts in contravention of, or is guilty of any offence against, this Act or any order made by the Privy Council in pursuance of the Act," he shall be liable to a penalty not exceeding 20*l*. In pursuance of the 75th section, the Privy Council have made an order which directs that the person in possession or charge of the animals affected with any contagious disease shall, "with all practicable speed," give notice of their being so affected. It must be taken on the case as stated that the appellant did not know that the animals in question were diseased. The magistrates are desirous of knowing whether the mere fact of the animals being diseased is sufficient to convict the person in possession of them or in whose field they were, even if he were not cognizant of the fact. I am of opinion that knowledge is an essential ingredient of the offence. I do not see how without knowledge a person can fairly be said to act in contravention of an order worded as the one now before us is. The provision is that notice is to be given "with all practicable speed." I cannot understand how, on any reasonable construction of these words, it can be said that a man can neglect to give notice with all practicable speed without knowledge of the fact of which he is to give notice. It has been contended on behalf of the respondent that the Act is aimed at the prevention of a great public evil, and that if it is necessary to prove knowledge it will be difficult or impossible to give effect to its provisions, and many cases were suggested in which the statute and orders might be evaded. There are two answers to this argument. First, this is a penal enactment, and we are bound, according to a well-established principle of interpretation, whatever the consequences, to construe it strictly. I do not deny that in construing the enactment we are entitled to take into consideration its object and the surrounding circumstances, but I do not find any such ambiguity in its terms as would entitle us to strain the language for the purpose

of giving effect to the alleged object. I am quite clear that the words of the order import the necessity of knowledge in order that there may be a contravention of it. I will not refer to the cases that have been cited at length. The case of *Core v. James* (1), referred to by Mr. Graham, is, no doubt, in favour of the view that knowledge is essential, but I do not attach very much weight to that decision as an authority governing the present case, for it appears to me that each case of this sort must depend on the wording of the particular statute which may be applicable to it. Here, I think, no doubt can arise on the words of the order. Then, with regard to the supposed consequence of our decision, viz., the facility with which the order may be evaded, the answer is, that the Lords of the Privy Council have it in their power, under the Act, to make what order they may think expedient. They can so frame their orders as to prevent all doubt on the subject and obviate the possibility of evasion: our duty is only to construe the order according to the plain import of the language used without regard to the consequences.

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HONYMAN, J. I am of the same opinion. I do not think it is necessary to add anything to what has been said by my Brother Keating with respect to the present case, but I just wish to say that it must not be supposed that I express any opinion on the question whether, if a farmer went away, leaving his business in charge of a bailiff or other servant, he might not be responsible if such servant knowingly omitted to give the required notice. That question is not raised by the case now before us.

Conviction quashed.

Attorney for appellant: *John Rogers, for Stimson.*

Attorneys for respondent: *King & McMillin, for Tindal & Baynes.*

(1) Law Rep. 7 Q. B. 135.

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April 25.

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THE SAME v. MASSEY.

THE SAME v. TORRENS.

*Company—Prospectus—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 38—
Fraud—Non-disclosure of Contracts made by Promoters or Directors.*

The 38th section of the Companies Act, 1867 (30 & 31 Vict. c. 131), which provides for the disclosure in the prospectus of a company of certain particulars with regard to the class of contracts specified in the section, is applicable only for the protection of shareholders in the company, and creates no statutory duty towards bondholders of the company or others for breach of which an action on the statute will lie:—

Quære, as to the nature of the contracts to which the provision is applicable.

Semble, per Honyman, J., that the section creates no statutory cause of action, but merely amounts to a declaration that, as between shareholders and those issuing the prospectus, the latter shall be deemed to have acted fraudulently.

FIRST count of the declaration in the action against Hay stated that the defendant was a director of the Canadian Oil Works Corporation, Limited, and before the issue of the said prospectus hereinafter mentioned the promoters of the said corporation had entered into a contract or contracts with the defendant and certain other persons that, in consideration of the defendant and the said persons consenting to allow their names to appear in the prospectus of the said corporation and otherwise as directors of the said corporation, the promoters would pay to the defendant and the said persons a large sum each in cash or fully paid-up shares of the said corporation: that the said contract or contracts were not specified upon the prospectus of the said corporation, nor in any way mentioned therein; and the defendant knew of the said contract or contracts, and knowingly issued the said prospectus with the fraudulent intent to induce the plaintiff and others to take bonds of the said corporation. And the plaintiff took divers such bonds on the faith of the said prospectus, without having had notice of the said contract or contracts. And by reason of the aforesaid fraud of the defendant, the plaintiff has lost the value of the said bonds and has been otherwise damnified.

Pleas to the first count: 3. That the said contracts were not

subject to adoption by, or binding upon, the directors or the said corporation.

4. That the said contracts were not contracts entered into by the said promoters, or the defendant, or the said other persons as agents for or on behalf of the said corporation, nor were they binding on or subject to adoption or ratification by the directors or the said corporation, or intended so to be.

5. That the plaintiff was not a person who took shares in the said corporation.

Demurrer to the 1st count of the declaration.

Demurrer to the 3rd, 4th, and 5th pleas.

Joinders in demurrer.

The pleadings in the other two actions were substantially similar, except that the declaration was against Massey as a trustee of the company, not as a director. (1)

Sir J. D. Coleridge, A.G. (Reid with him), for the plaintiff in the respective actions:—

The first count of the declarations in these actions discloses the breach of a statutory duty by the defendant, by which damage was caused to the plaintiff. The fact that the plaintiff is a bondholder, and not a shareholder, does not affect the right of action. The section is clearly divisible into two parts. The latter part, no doubt, contains a provision solely applicable to the case of shareholders, and provides that a certain specified effect shall follow from a breach of the duty created by the former part of the section in their case; but the former part taken alone is an enactment of an express statutory duty. Consequently, assuming the contract not disclosed to have been within the section, the de-

(1) The 38th section of the Companies Act, 1867 (30 & 31 Vict. c. 131), enacts as follows: "Every prospectus of a company and every notice inviting persons to subscribe for shares in any joint-stock company shall specify the dates and the names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof before the issue of such prospectus or notice, whether subject to

adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

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defendants have clearly been guilty of an illegal act, and the plaintiff, being thereby injured, is entitled to sue as in the ordinary case of private damage resulting from breach of a statutory duty. The mischiefs intended to be guarded against clearly apply to the case of a bondholder as much as to that of a shareholder.

[HONYMAN, J. You must go the length of saying that not bondholders only could sue for breach of this duty, but any member of the public injured by its non-performance.]

Secondly, the contract not disclosed was clearly within the section. The intention was that contracts affecting the character and prospects of the company should be disclosed, so that all parties interested might have materials for judging of its position. It is not necessary that the contract should be made, or intended to be made, on behalf of the company. A private and collateral contract made by the promoters or directors, if it bears upon the position of the company, must be disclosed. It is obvious that it would be most material to anyone interested in the company to know that the names of persons of weight and experience on the prospectus were procured by payment of a sum of money.

Even if the count be not good under the statute, it is a good count for a fraudulent representation at common law. [He cited *Atkinson v. Newcastle and Gateshead Waterworks Company* (1); *Venezuela Railway Company v. Kisch* (2).]

Sir J. Karlake, Q.C. (Holl with him), for the defendant Hay.

H. James, Q.C. (R. E. Turner with him), for the defendant Massey.

R. V. Williams, for the defendant Torrens.

The section cannot be divided into two parts, as suggested, and is clearly meant to apply to the case of shareholders only. The construction contended for by the plaintiff is far too extensive, inasmuch as it would apply not to bondholders merely, but to any creditor of the company. It could not have been the intention to create a statutory duty so extensive as this. It is submitted that the section was never intended to give a right of action at law for breach of a statutory duty. It simply provides that, as between the company and shareholders a prospectus shall be deemed a fraud if it do not disclose a certain class of contracts. This was probably intended

(1) Law Rep. 6 Ex. 404.

(2) Law Rep. 2 H. L. 99.

to be applicable to questions arising in equity on winding-up, with respect to placing persons on the list of contributories. In such cases, where there has been fraud, a person may be entitled to relief. The mere non-disclosure of the contract, even if fraudulent, is no cause of action or ground of equitable relief per se. The party complaining must go on to shew that he was thereby induced to take the shares, and has suffered injury, or ought not to be made responsible. Secondly, the contract not disclosed was not within the section. The section is not intended to apply to contracts made between promoters, or directors in their private capacity and others, though such contracts may be collaterally connected with the formation of the company. The contracts intended are contracts made by promoters, &c., as representing or on behalf of the company; not necessarily contracts to which the company is intended to be nominally a party, but contracts of which the burthen would fall on the company, and which, in substance, though not in form, amount to contracts of the company. The 38th section must be read in connection with the immediately preceding section, which relates to contracts "on behalf of any company." The words, "whether subject to adoption or otherwise," would be insensible, unless this construction be correct. They are wholly inapplicable to contracts not made on behalf of the company, but affecting promoters, &c., only in their private capacity. The construction contended for by the plaintiff is obviously far too wide; for, according to it, every contract made by a promoter in his private capacity, in any way connected with the business of the company, must be disclosed: as, for instance, a contract with a printer, to pay for printing expenses incurred in getting up the company. The shareholder is entitled to know on what liability he embarks, but not the history of all the acts of the promoters. Thirdly, this is not a good count for a fraudulent representation at common law. It is obviously intended to be based on the statute, and the plaintiff ought not to be allowed now to treat it as based on the common law doctrine of fraud. The allegation that the prospectus was issued with fraudulent intent, must be treated as a mere allegation of law, and, unless the facts alleged shew a fraud, cannot make the count good. It is essential that there should be an allegation that the plaintiff was induced by the fraud to take

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bonds in the company. It is submitted that there is no such allegation. It is alleged that the plaintiff took bonds on the faith of the prospectus. That is not equivalent to such an allegation; for it must amount to a statement, that if the contract had been disclosed, the plaintiff would not have taken the bonds. It is not alleged that anything stated in the prospectus was not perfectly true.

[HONYMAN, J. It might possibly be put, that the prospectus impliedly alleged that the defendants were bonâ fide directors; whereas, in truth they were mere sham directors, whose names had been procured by a sum of money.]

The count is not fairly capable of such a construction. The case of Massey differs from that of the other defendants with respect to the question of statutory liability, inasmuch as the section does not provide that the issuing of the prospectus shall be deemed fraudulent as against trustees, but only as against promoters, directors, and officers. A trustee is not an officer within the meaning of the section. He is not, as trustee, one of the executive officers engaged in the management of the company.

[They cited: *Heymann v. European Central Ry. Co.* (1); *Scott v. Lord Ebury*. (2)]

The *Attorney-General*, in reply.

KEATING, J. I am of opinion that the declaration is bad. It is founded upon the 38th section of 30 & 31 Vict. c. 131. That section appears to me to be in its terms applicable only to persons taking shares in the company. I can see many reasons why the case of bondholders should come within the mischief intended to be guarded against in the case of shareholders, and, on the other hand, important distinctions may be suggested between the two classes; but at all events we are bound by the words of the section, and unless we can see our way to adopting the ingenious suggestion of the Attorney-General, and divide the section into two distinct parts, reading the first part as containing a general prohibition in favour of the public at large, we cannot extend the provision beyond the case of shareholders. I am of opinion that we cannot so construe the section; consequently, the plaintiff, who is not a

(1) Law Rep. 7 Eq. 154.

(2) Law Rep. 2 C. P. 255.

shareholder, but a bondholder, cannot maintain this action. I do not wish to be understood as giving any countenance to the argument that the contract disclosed in this declaration is not a contract such as the directors would be bound to disclose by the prospectus under the section. It seems to me that its subject matter was such that a shareholder might reasonably be entitled to be made acquainted with it, and its non-disclosure appears to me to be within the mischief contemplated by the Act. It was argued on a suggestion to that effect, thrown out by the Court, that this declaration might be construed as a good count for a common law misrepresentation. I am disposed to think it is not so; but, at all events, I think it is not such a count, considered as a count for fraudulent representation, as the defendant ought to be made to go down to trial upon. Therefore, if the defendant applied to us, as, under these circumstances, he probably will, to proceed under the 52nd section of 15 & 16 Vict. c. 76, on the ground that the count was embarrassing, we should certainly deem it our duty to strike it out, or compel the plaintiff to amend, so as to cure defects of ambiguity, which, if they do not amount to ground of general demurrer, are in a high degree calculated to embarrass.

The view we have taken of the case renders it unnecessary to deal with the arguments that have been put forward with respect to the general intention of the legislature in passing this section. It is unnecessary to decide whether, as Sir John Karlake and Mr. Williams suggested, it was intended merely to have relation to proceedings in equity, as to placing parties upon the list of contributories. We are not called upon to express an opinion on that point in the present case, inasmuch as the plaintiff is not a shareholder, and in our opinion the section only applies to shareholders.

HONYMAN, J. I am of the same opinion. With respect to the question whether this count is good, considered as based on the statute, I am of opinion that the section is not intended to give a statutory cause of action at all. It seems to me that, taking the whole of the section together, it amounts simply to a provision that, as between certain parties, a prospectus which does not reveal a certain class of contracts shall be deemed fraudulent. Such a

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prospectus would not per se give a right of action at law or a claim to relief in equity. The party complaining must go on in equity, for instance, to shew that he had not so dealt with his shares, as to deprive him of the right to relief, and at law that he was induced by the fraud to take the shares. I am also of opinion that the section cannot be read in two distinct parts, as suggested on behalf of the plaintiff. It never could have been intended to give so extensive a right of action as that contended for against anyone publishing a prospectus within the terms of the section. The case of *Atkinson v. Newcastle and Gateshead Waterworks Company* (1), which was cited by the Attorney-General, is not really analogous, because in that case there were two wholly distinct enactments. In the view I take it is unnecessary to decide whether we shall adopt the construction of the section for which Mr. Williams so ably contended, namely, that the contracts intended by the section are only contracts made, or intended to be made, on behalf of the company; but I wish for my own part to say that I am not, as at present advised, prepared to adopt that construction. I cannot think it is a matter of indifference to the shareholders what contracts were entered into by promoters in their private capacity relating to the formation of the company. It is obvious that it may be of vital importance to them to know of such contracts in forming a correct judgment as to the position of the company. It might obviously make a very great difference if the names of persons who appeared on the prospectus as interested in or connected with the company were mere dummies, and such persons really had no stake in the concern at all. Whatever the construction of the statute may be with respect to the points to which I have alluded, I am clearly of opinion that the declaration is bad, on the ground that the plaintiff, not being a shareholder, is not within the section. The legislature might, perhaps, if it had occurred to them, have very reasonably extended the provisions of the section to bondholders; but they have not done so: shareholders only are mentioned. The section, if meant to include bondholders, would have run "every prospectus or every notice inviting persons to subscribe for shares or bonds." In *Massey's*

(1) Law Rep. 6 Ex. 404.

case, I think the declaration is bad, on the additional ground that he is only a trustee of the company; and there is no provision in the section, as it seems to me, that the prospectus shall be deemed fraudulent as against a trustee, for I do not think a trustee comes within the meaning of the word "officer." With respect to the suggestion that this count may be construed as a good count at common law, I am disposed at present to agree with my Brother Keating in thinking it bad, though I am not without doubts on the subject; but I quite concur in thinking that it is such a count as the defendant would be entitled to have struck out as embarrassing on application to that effect. I cannot conceive anything more likely to prove embarrassing than to be discussing at nisi prius the exact meaning of the allegations of this count, considered as a count for fraudulent misrepresentation.

[The counsel for the defendants thereupon applied to the Court to strike out the count, and the counsel for the plaintiff for leave to amend, and the Court ordered that the count should be struck out, unless within fourteen days the plaintiffs should amend; the costs of the argument of the demurrers and amendment, if any, to be defendants' costs in any event.]

Judgment accordingly.

Attorney for plaintiff: *Webb.*

Attorney for defendant Hay: *Sydney Gedge.*

Attorneys for defendant Massey: *J. & R. Gole.*

Attorney for defendant Torrens: *H. W. Vallance.*

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April 28.

Conveyance of Land subject to Reservation of Mines and Mining Powers—Compensation to Grantee for Exercise of Powers reserved—Mode of Assessment—What Damage the Subject of Compensation.

A conveyance of land in fee was made subject to a reservation to the grantors of mines and minerals, and extensive powers of occupying and using the surface for the purpose of working the same. It was provided thereby that it should not be lawful for the grantee to do or suffer anything to be done whereby the grantors should be prevented, hindered, or obstructed in the exercise of the powers reserved, and also that the grantors should make to the grantee annually reasonable compensation for damage or spoil of ground to be occasioned by the exercise of the reserved powers. Previously to the date of the deed of conveyance the premises were leased to the grantee, subject to similar reservations to those in the conveyance, and workings already existed which had taken place under such reservations :—

Held, that no restriction was placed by the words of the conveyance on the use by the grantee of the land for any purpose to which it was applicable so long as he did not touch or interfere with the minerals, and the compensation for damage or spoil of ground occasioned by the exercise of the powers reserved must be estimated with reference to the value of the land for any purpose to which an ordinary owner might put it; and that compensation was due in respect of damage arising from the use subsequently to the conveyance of land included therein that had been previously occupied and used for mining purposes, but not in respect of the mere existence of workings in being at the time of the deed, or their subsequent user without any fresh damage.

SPECIAL case stated by an umpire under an agreement for arbitration, of which the facts were in substance as follows :—

By indenture of lease dated the 21st of July, 1856, the defendants demised lands for the term of twenty-one years to certain persons jointly, to hold the same with certain reservations of the woods and mines upon and under such lands, and powers for working the same, paying compensation for damage or spoil of ground occasioned thereby to the lessees. This lease was assigned to the plaintiff in July, 1859.

By an indenture of the 10th of September, 1859, the reversion in fee of the hereditaments and premises comprised in the lease was granted to plaintiff. In this last-mentioned indenture were contained the following exceptions and reservations from the grant thereby made, that is to say : “ Save and except and always reserved out of these presents and the grant and confirmation thereby

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made, or intended so to be, to the said dean and chapter, their successors and assigns, all mines, pits, quarries, seams and beds of coal, stone, clay, lead, and other minerals and substances whatsoever, whether opened or unopened, in, within, or under the said hereditaments and premises, and also full and free liberty of access, ingress, egress, and regress, to and for the said dean and chapter, their successors, &c., from time to time, and at all times hereafter, with or without horses, &c., to enter into, upon, through, or over all or any of the said lands, &c., using and occupying so much of the said lands, &c., as shall be necessary or proper for having access and winning, and getting, and carrying away, and, if desired, of converting, manufacturing, or otherwise disposing of the said mines, minerals, &c., and particularly full and free liberty, power, and authority to have, take, and occupy sufficient land for agents or workmen's houses, pit, and heap room, furnaces, engines, and engine houses, and other like conveniences." There were also provisions that the defendants should be entitled to make drains and watercourses, and to form roads, and to make cuttings, embankments, bridges, tunnels, or other works, through the lands conveyed, and to lay down iron rails and other materials for the purpose of using such roads, and to erect and have any engine houses, station houses, or other erections, or any depôts or yards or other conveniences, and to haul and carry goods, coals, and other minerals and substances on any such roads or ways with any engine, and in any manner whatsoever. And also that the defendants and their successors, &c., should have full power to do any and every act for the purpose of the foregoing exceptions, or any of them, in, upon, over, under, or with respect to the said lands, that they could have done had they been and continued the sole and absolute owners of the fee simple in possession thereof, and that the rights, liberties, matters, and things thereinbefore excepted and reserved or regranted should be taken and considered as commencing as and from the day before the date of these presents, and should be taken to be to the absolute and entire exclusion of the said Joseph Mordue, his heirs, &c., from the right of using or exercising, or of granting and permitting any other person or persons to use or exercise any of the same in or upon, over, across, through, or under, or in respect of the said lands, and that it should

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“not be lawful for the said Joseph Mordue, his heirs or assigns, or any person or persons claiming, or to claim, by, from, through, or under him or them, to make, do, or commit, or suffer to be done or committed, any act, matter, or thing whatsoever, whereby or in consequence whereof the said dean and chapter, &c., should be in any way prevented from or interrupted, hindered, obstructed, or injured in the free and undisturbed use, exercise, or enjoyment of the same, or any of them: provided always, that the said dean and chapter and their successors, &c., shall pay to the said Joseph Mordue, his heirs, &c., annually, reasonable compensation for damage or spoil of ground to be occasioned by the exercise of all or any of the powers, liberties, and privileges expressed and reserved, such annual compensation, as often as any cause for the same shall have arisen, if the parties cannot agree, to be determined by the adjudication of two indifferent persons, to be chosen from time to time one by each party, or by an umpire to be chosen by such two indifferent persons.” Mr. Joseph Anderson, as lessee under the defendants, and under the provisions and authorities granted or demised to him under and by virtue of an indenture of lease dated the 25th of May, 1864, or otherwise by the licence, authority, and permission of the said defendants, had exercised over divers parts of the lands comprised in the indenture of the 10th of September, 1859, the rights, easements, and authorities, or some of them reserved by the said last-mentioned deed. At the time of that deed’s execution there was upon the land an old pit-shaft which had been abandoned in 1856, the buildings in connection therewith being taken down. A dispute having arisen with regard to the compensation to be paid to plaintiff under the deed of 1859, and having been referred to arbitration, it was contended before the umpire on behalf of the plaintiff that so far as regards the land used and occupied under the reservations in the deed the compensation to which the plaintiff was entitled was the marketable annual value of the lands for any purpose for which the lands were applicable, and that as regards other parts of the plaintiff’s land not used or occupied, but which were damaged by severance or otherwise by the use and occupation of the part used and occupied, the plaintiff was entitled to the amount by which their marketable annual value was diminished. It was con-

tended on behalf of the defendants that the plaintiff was not entitled to have the compensation assessed on the above principles; and further, that he was not entitled to compensation as to some parts of the land in respect of which he claimed compensation.

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The opinion of the Court was asked by the umpire upon the following questions:—

1. Whether the compensation for damage or spoil of ground was to be inclusive of ground occupied by pits which were open and existing at the time of the execution of the deed of conveyance of the 10th of September, 1859?

2. If exclusive of ground occupied by such pits, whether such ground was to be inclusive or exclusive of grounds used or occupied at the time of the execution of the said deed with and for the necessary purposes of such pits?

3. Whether the compensation for damage or spoil of ground was to be inclusive or exclusive of ground which at the time of the execution of the deed was used or occupied for having access to, or getting or carrying away, or converting, manufacturing, or otherwise disposing of the excepted minerals and premises, or any other minerals or substances, or for agents' or workmen's houses, or for pit or heap room, furnaces, or engine houses, or other like conveniences.

4. Whether the compensation for damage or spoil of ground was to be inclusive or exclusive of ground which at any time after the execution of the said deed might be used or occupied for the purposes mentioned in the preceding questions, or any of them.

5. Whether the compensation for damage or spoil of ground (to whatever it was applicable) was to be estimated with reference to the value of the ground, if usable only for the purposes for which it was used at the time of the execution of the said deed, or with reference to its value, if usable for building or any other purposes to which it was applicable, or with reference to its value as subject to any restrictions necessarily imposed upon its use by the provisions of the said deed, or on what other principle.

6. Whether the plaintiff was restricted by the provisions of the said deed from using the land for any purposes which would substantially add to the surface weight to be supported from below.

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7. Whether the plaintiff was restricted by the provisions of the said deed from using the land for any purpose for which it could not be used without interfering with the minerals or other substances excepted and reserved by the said deed, or with the powers thereby excepted and reserved for working or getting the said minerals or substances.

8. Whether the restrictions referred to in the two last preceding questions, or either of them, or any other restriction necessarily imposed upon the use of the land by the provisions of the said deed, ought to be taken into consideration in estimating the damage or spoil of ground, and how, and upon what principle.

Herschell, Q.C. (Wood Hill with him), for the plaintiff. The compensation for damage or spoil of land caused by the exercise of the powers reserved must be assessed with reference to the value of the land for any purpose to which it may be applicable. The defendants contend that the effect of the clause in the conveyance which forbids any interference by the grantee with the exercise of the reserved powers is to restrict the plaintiff from putting the land to any use inconsistent with its use for mining purposes. The argument clearly goes too far. This would prevent the plaintiff from erecting any building, however temporary its character, upon the land; or from using it for any purpose but agriculture, for which purpose, considering the nature of its surroundings, it might probably have no value. Upon this principle there would be no compensation at all due, for the land would be of no value to the grantee. The meaning is, that when they think fit the defendants may use the land for mining purposes, and the plaintiff is not to interfere with or prevent such use of it; but the defendants must make compensation according to the ordinary marketable value of the land.

A question will be raised as to whether compensation is to be made in respect of pits open at the time of the conveyance.

With respect to the old unused pit, it must be admitted that as to the mere existence of that, while it continues unused no compensation is due.

With respect to damage caused by the subsequent working of pits open at the date of the conveyance, or by the subsequent user

of lands then already occupied for mining purposes, compensation is clearly due. [He cited *Duke of Buccleuch v. Wakefield*. (1)]

Kemplay, Q.C. (*Haselfoot* with him), for the defendants. It is contended that there is no compensation to be made in respect of damage arising from the use of pits open at the date of the conveyance, and from the accessories necessary to the working of them. The plaintiff took the land subject to the right to use them. With respect to the basis upon which compensation is to be assessed, it is submitted that, looking to the provisions of the deed, it was obviously never intended that the grantee should be entitled to alter the condition and character of the land in a manner inconsistent with mining operations; as, for example, to burthen the surface of the land with buildings, so that mining would be impossible without letting them down. The powers reserved are so extensive, and the restrictions so widely expressed, that it was clearly intended that the surface should remain substantially unaltered. The value of the land must, therefore, be estimated with reference to the restrictions put upon its user, and not as though it were applicable to any purpose. [He cited *Bell v. Wilson* (2); *Rowbotham v. Wilson* (3); *Hext v. Gill* (4); *Caledonian Railway Company v. Sprott* (5); *Shafto v. Johnson* (6); *Smith v. Darby* (7); *Eadon v. Jeffcock* (8); *Smith v. Thackerah*. (9)]

Herschell, Q.C., in reply. The only restriction imposed on the grantee is, that he is not in any way to touch or interfere with the minerals, and so far as any purpose is concerned for which the land could not be used without doing so, that must be considered in estimating the compensation; but the restriction cannot have the sweeping construction contended for. The grantors can only restrict or prevent the plaintiff's use of the land for any purpose to which it is applicable without actual interference with the minerals upon payment of compensation.

BOVILL, C.J. There may be some difficulty with respect to the

- (1) Law Rep. 4 H. L. 377.
 (2) 2 Dr. & Sm. 395; Law Rep. 1 Ch. 303; 34 L. J. (Ch.) 572.
 (3) 8 H. L. C. 348; 30 L. J. (Q.B.) 49.

- (4) Law Rep. 7 Ch. 699.
 (5) 2 Macq. 449.
 (6) 8 B. & S. 252, n.
 (7) Law Rep. 7 Q. B. 716.
 (8) Law Rep. 7 Ex. 379.

- (9) Law Rep. 1 C. P. 564.

(2) SC 11 June MS. 437, 12 L. 263.

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particular expressions used in some of the clauses of the conveyance upon the construction of which the present case must depend, but the general effect of the language seems to be that the property in the soil is to pass to the plaintiff with the exception of the minerals, which are to remain in the defendants, the Dean and Chapter of Durham.

It is a conveyance of the soil and buildings thereon to the plaintiff in the condition in which they then existed, and it appears to me that the plaintiff thereby acquired all the ordinary rights of an owner of freehold property, subject to such rights as were expressly reserved or re-granted to the dean and chapter. The reservation is in substance one of all minerals with complete powers of getting and working them, and of erecting buildings, machinery, and such other works as might be necessary for those purposes, and these powers relate not only to pits thereafter to be opened, but to pits already open.

The plaintiff, by an express provision of the deed, is absolutely excluded from using or exercising any of the rights vested in the dean and chapter with respect to the enjoyment of the minerals. There is also a general clause which prevents the plaintiff from interfering with the exercise of the powers reserved to the dean and chapter, and if this clause were to be construed according to the widest interpretation of the words employed, as contended for on behalf of the defendants, there is hardly an act which could be done by the plaintiff in the exercise of the ordinary rights of an owner with respect to the land which might not in one sense be a hindering or interrupting of the exercise of the powers reserved.

But I am of opinion that this clause must receive a reasonable interpretation, taking into consideration the general objects of the conveyance; and that it must be taken to refer to any actual interference with the powers reserved at the time when it may be sought to exercise them, and not to be intended to prevent the ordinary use of the land by the plaintiff as owner of the freehold. The exercise of the rights reserved to the dean and chapter is made subject to a provision for compensation to the plaintiff for damage or spoil of ground which may be occasioned by the exercise of all or any of the powers reserved, to be ascertained from time to time, as occasion may arise, by arbitration. On the whole

it appears to me that under the provisions of this deed the plaintiff, as purchaser of the reversion, had a right to use the land in any way which he might think fit, provided he did not touch or interfere with the minerals: to build on it, or put it to any other purpose for which it might be suitable; that the powers given to the defendants do not in any way amount to restrictions on the ordinary rights of the plaintiff as owner, and that, therefore, the compensation is to be assessed on the principle that there are no such restrictions. A question was raised with respect to an old pit shaft existing at the date of the conveyance, and with respect to that I am of opinion that no compensation could be claimed for its mere continuance in existence, but that if it were used afresh and damage resulted therefrom, or if new buildings were erected, tramways laid down, or workmen's cottages built in connection therewith, to all these new workings the compensation clause would apply. With respect to the basis upon which the compensation is to be assessed, I am of opinion that it must be assessed according to the marketable annual value of the land with reference to the purposes to which these lands might reasonably be applicable. And I think that the plaintiff is entitled to compensation not only in respect of the land actually taken or used in the exercise of the reserved powers, but also of the damage occasioned to parts of the land not taken by severance or otherwise.

To apply the principles already laid down to the various questions put to us: with respect to the first and second questions, I am of opinion that the plaintiff is not entitled to compensation in respect of the mere existence of the old pits or damage already occasioned thereby at the date of the deed, but for future damage which may be occasioned thereby he is entitled. I am also of opinion that he would be entitled to compensation in respect of any land that has been or that may hereafter be used as accessorial to the working of such pits, not having been so used at the time of the execution of the deed. In answer to the third question, I am of opinion that the plaintiff is entitled to compensation in the case of lands which had been already used or occupied for the purposes enumerated prior to the execution of the deed, in respect of the damage occasioned by the use of such lands, if any, for such purposes subsequent to the

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execution of the deed. For what existed at the date of the deed, and for the subsequent user without any fresh damage, I think no compensation can be given. With respect to the fourth question, the defendants themselves admit that the question must be answered in the affirmative. With respect to the fifth question, I am of opinion that the compensation is to be assessed with reference to the value of the land for any purpose to which it might be reasonably considered as applicable, without any restriction being considered as imposed by the terms of the deed. I think as regards the sixth question, that no restriction is imposed on the plaintiff's building on the land, although the surface weight to be supported from below might be thereby increased. Such seems to me to be the true construction of the deed taking the view of it which I do; and I am supported in that conclusion by the decisions which have been referred to. With regard to the seventh question, I am of opinion that the plaintiff is not restricted from using the land in any way, except that he may not take or touch the minerals themselves. And with regard to the eighth question, I think that the provisions of the deed in favour of the defendants ought not to be taken into consideration for the purpose of diminishing the amount of the compensation, excepting only in respect of the minerals themselves, for which, as being excepted out of the conveyance, the plaintiff is entitled to no compensation.

GROVE, J. I am of the same opinion. Some of the questions asked of us seem to be somewhat difficult to answer as mere matters of law, and are rather questions for the arbitrator in assessing the amount of the compensation. I do not suppose any arbitrator would assess the value of this land as being capable of being used for a gentleman's mansion or park. He would look to some extent to the nature of the land as it actually existed at the time of the assessment of compensation, and so far there would be some diminution of value; but he ought not, I think, to take into consideration, in estimating its value, prospective deterioration of value to the extent which might be occasioned by the exercise of the powers reserved by the dean and chapter. This would be an incorrect mode of estimating the compensation, for if the powers were not exercised the purchaser would have the benefit of the land

for any purpose to which it might be applicable; and if they are exercised, by the terms of the deed he is to be entitled to compensation for any damage occasioned thereby.

DENMAN, J., concurred.

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Judgment for the plaintiff.

Attorneys for plaintiff: *Williamson, Hill, & Co.*

Attorney for defendants: *J. G. Watson, for Richardson Peele.*

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May 8.

Practice—Costs—County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5—“Action founded on Contract.”

In an action against a hackney carriage proprietor for not securely carrying certain luggage belonging to a person who had hired his carriage, the declaration alleged that in consideration that the plaintiff would with her luggage become a passenger in such carriage, and of certain reward to be paid to the defendant by the plaintiff in that behalf, the defendant promised to carry the plaintiff and her luggage safely, and that the defendant not regarding his duty as hackney carriage proprietor nor his said promise did not safely carry the plaintiff's luggage, but so carelessly and negligently conducted himself that part of the said luggage was lost. The plaintiff having recovered the sum of 20*l.* in the action:—

Held, that she was deprived of costs by the County Courts Act, 1867, s. 5, the cause of action as set forth in the declaration being founded on contract.

Tattan v. Great Western Ry. Co. (2 E. & E. 844; 29 L. J. (Q.B.) 184) discussed. *6 Jura 45800*

THIS was an application for a rule to tax the costs of the action under the following circumstances.

The declaration in substance stated that the defendant was the proprietor of a certain hackney carriage, which said hackney carriage was at the time, &c., under the care, management, and direction of defendant's servant, and plying for hire within the limits of the Metropolitan Police District, and thereupon, and after the passing of the Act of Parliament made and passed in the seventh year of her present Majesty, intituled “An Act for regulating Hackney and Stage Carriages in and near London,” the plaintiff, at the request of the defendant, hired the said hackney carriage of the defendant to convey and carry the plaintiff and her luggage

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from and to certain specified places, and thereupon, in consideration of the premises, and that the plaintiff, together with her said luggage, would, at the request of the defendant, become and be a passenger to be carried and conveyed in the said hackney carriage as aforesaid, and of certain reward to the defendant in that behalf, he the defendant as and being such proprietor of the said hackney carriage as aforesaid, then promised the plaintiff to convey her and her said luggage safely and securely from and to the places specified, and accepted her and her said luggage to be so carried; but the defendant, not regarding his duty as such proprietor of the said hackney carriage as aforesaid, or his said promise, did not nor would carry or convey the plaintiff and her said luggage safely and securely, but so carelessly and negligently behaved and conducted himself by his said servant in that behalf in and about the premises, that by and through the mere carelessness, negligence, and improper conduct of the defendant by his said servant, and not otherwise, part of the plaintiff's said luggage became and was wholly lost to the plaintiff. Plea: payment into court of 15*l*. Replication that 15*l*. was not sufficient. The plaintiff at the trial obtained a verdict for 5*l*. above the amount paid into court, and the question therefore arose whether the plaintiff having recovered a sum not exceeding 20*l*. was deprived of costs by virtue of the County Courts Act, 1867 (30 & 31 Vict. c. 142) s. 5.

Kydd, in moving for a rule nisi, contended that the action must be considered as founded on tort. The case of *Tattan v. Great Western Ry. Co.* (1) decided, with reference to the question of costs, that an action against a common carrier for not safely delivering goods is an action of tort founded on the custom of the realm, and not one of contract. It is submitted that the position of a hackney carriage proprietor with respect to the luggage of persons hiring his carriage is that of a common carrier. The declaration must be treated as one in tort; the statement in the declaration of the contract is mere inducement, shewing the facts from which the duty arose; the cause of action is the breach of duty.

(1) 2 E. & E. 844; 29 L. J. (Q.B.) 184.

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BOVILL, C.J. I think there should be no rule. The provisions of the County Courts Act, 30 & 31 Vict. c. 142, s. 5, deprive the plaintiff of costs if he does not recover a sum exceeding 20*l.* in actions founded on contract, or 10*l.* in actions founded on tort. The defendant paid into Court the sum of 15*l.*, and the jury awarded the further sum of 5*l.*, so that in the whole the sum recovered did not exceed 20*l.* The question thus arises whether the present action is founded on contract within the meaning of the section. On looking to the form of the declaration, it appears to me clear that the cause of action therein alleged is one founded on contract. In many cases previous to the introduction of the present rules of pleading it became material to consider, with a view to preventing misjoinder of counts, whether a count could be framed in case instead of assumpsit. And it was a common practice to treat causes of action founded on contract as actions of tort, and to frame declarations alleging a contract and a duty arising therefrom, and complaining of a breach of such duty by neglect to perform the contract. Here the contract alleged in the declaration would be implied by law on the hire of the carriage, and the cause of action is therefore rightly put as founded on the contract. In the case of *Tattan v. Great Western Ry. Co.* (1), which was cited, the Queen's Bench treated the cause of action as one founded on tort; but the Lord Chief Justice expressed his regret at the anomalous state of the law, by which an option being given to the plaintiff to sue in either form, the right to costs depended merely on the form of the declaration. It is sufficient to say with regard to that case, that the Court considered the form of declaration to amount to case and not contract. There was no statement there of any promise or consideration as in this case; but the cause of action was founded wholly on the breach of duty. The case is therefore clearly distinguishable from the present, inasmuch as it proceeds on the precise character of the cause of action as alleged in the declaration, which was wholly different from that in the present case. In the case of *Legge v. Tucker* (2), where the action was against a livery stable keeper for negligence in the care of a horse, the Court thought that the

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(1) 2 E. & E. 844; 29 L. J. (Q.B.) 184.

(2) 1 H. & N. 500; 26 L. J. (Ex.) 71.

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cause of action was founded on contract. This decision preceded that of *Tattan v. Great Western Ry. Co.* (1), and though it appears to have been cited, the Court in delivering their judgment made no observations upon it. Since both those decisions the case of *Morgan v. Ravey* (2) was decided. In that case an innkeeper's executors were sued for the not keeping securely the property of a traveller, and with reference to the difference between their liability in cases of tort and contract, it became necessary to consider whether the action was founded on tort or contract, and it was considered that it was founded on contract, and the executors were therefore held liable. Mr. Bullen, in his excellent work on Pleading, 3rd ed. p. 121, states that the question of costs depends on the substance of the thing, not on mere matter of form. Pollock, C.B., says, in delivering the considered judgment of the Court in *Morgan v. Ravey* (3): "We think that the cases have established that where a relation exists between two parties which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him." Looking to those authorities, if it were now necessary to consider the case of *Tattan v. Great Western Ry. Co.* (1), and to decide upon what seems to amount to a conflict of authority, I should be disposed to adopt the decisions of the Court of Exchequer and the principles on which they are based, but it is not necessary to do so in this case, inasmuch as it is distinguishable from *Tattan v. Great Western Ry. Co.* (1) on the form of the declaration.

KEATING, J. I am of the same opinion. I do not pronounce any opinion on the question whether the decision in *Tattan v. Great Western Ry. Co.* (1) is right or not, for I think that case is distinguishable from the present. There the declaration was against a common carrier on the custom of the realm, here a promise is alleged and a breach of such promise. It seems to me that the cause of action here is plainly founded on a contract within the meaning of the section.

(1) 2 E. & E. 844; 29 L. J. (Q.B.) 184. *See also* (2) 6 H. & N. 265; 30 L. J. (Ex.) 131.

(3) 6 H. & N., at p. 276.

HONYMAN, J. I am of the same opinion. There are many actions against carriers and other parties in which the declaration may be framed either in tort or contract. The distinction between the two was very material in former days. The rule is thus laid down by Tindal, C.J., in *Boorman v. Brown* (1): "That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which nevertheless the remedy for the breach or non-performance is indifferently either assumpsit or case upon tort is not disputed; such as actions against attorneys, surgeons, and other professional men, for want of proper skill or proper care in the service they undertake to render; actions against common carriers, against shipowners on bills of lading, against bailees of different descriptions, and numerous other instances occur in which the action is brought in tort or in contract at the election of the plaintiff." The decisions on the right to costs in such cases do not appear to be very easily reconcileable. It does not seem altogether satisfactory that the plaintiff should by declaring in one particular form rather than another alter the liability of the defendant in respect of costs, but many of the authorities seem to shew that he may do so. In this case, however, the form of the declaration in my opinion is clearly that of a declaration in contract. The duty alleged is alleged as proceeding from the contract between the parties. The plaintiff having chosen so to frame the cause of action cannot now, it appears to me, turn round and say that for the purposes of costs the cause of action is based on tort. As regards the decision in *Tattan v. Great Western Ry. Co.* (2) and the other decisions that have been referred to, I pronounce no opinion as to which we ought to follow if it were necessary to decide between them. It is clear on consideration of the former case that the declaration there was a declaration on the case, and the present case is therefore distinguishable.

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(1) 3 Q. B. 516.

(2) 2 E. & E. 844; 29 L. J. (Q.B.) 184.

(1873) L. R. 8 C. & P. 350. SMITH *Applied.* BANQUE DES
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 COU *v.* KINDERSLEY
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May 8.

Trover—Bill of Sale void as against Trustee of Bankrupt's Estate—Sale of Goods under—Proceedings under Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 72, by Trustee to recover Proceeds of Sale—Waiver of Tort.

The trustee of a bankrupt's estate applied, under the 72nd section of the Bankruptcy Act, 1869, to the Court of Bankruptcy to declare a bill of sale, made by the bankrupt previously to his bankruptcy, fraudulent and void as against himself as trustee, and to order the assignee under the bill of sale who had previously to the bankruptcy sold the goods comprised therein, to pay over the proceeds of the sale to himself as such trustee. The Court of Bankruptcy having made the order prayed for, and the assignee having accordingly paid over the proceeds of the sale :—

Held, that the trustee could not afterwards bring an action of trover against the assignee under the bill of sale to recover the difference between the value of the goods and the amount realized by the sale, inasmuch as by the proceedings in bankruptcy to recover the proceeds of the sale he had affirmed such sale and waived the tort.

DECLARATION by the plaintiff as trustee of the property of William Dale, a bankrupt, for a conversion of the goods of the plaintiff as such trustee.

Pleas. 1, Not guilty; 2, Not possessed.

3. That the alleged conversion was the sale by the defendant, on the 4th of November, 1871, for the sum of 179*l.* 18*s.* 6*d.*, of certain goods comprised in and sold under a bill of sale dated the 4th day of March, 1871, and being the goods in the declaration mentioned, and the plaintiff as and being the trustee of the property of the said William Dale gave notice to the defendant on the 7th day of March, 1872, that the County Court of Gloucestershire, holden at Bristol, being the Court having jurisdiction in the matter of the bankruptcy of the said William Dale, and wherein bankruptcy proceedings therein were then pending, would be moved on the 15th day of March, 1872, on behalf of the plaintiff, for an order that the said bill of sale might be declared to be fraudulent and void as against the plaintiff as such trustee, and the defendant might be ordered to pay over to the plaintiff, as such trustee, all the moneys realized by the sale of such of the goods comprised in the said bill of sale as had been sold, and to deliver to the said plaintiff, as such trustee, such of the said goods as

might still remain unsold, and on the said 15th day of March, 1872, the said County Court was moved accordingly, and did declare and order that the said bill of sale was fraudulent and void as against the plaintiff, and that the defendant should pay the sum of 179*l.* 18*s.* 6*d.*, the gross amount realized thereunder, to the plaintiff, and the defendant accordingly did pay the said sum, which was the gross amount realized under the said bill of sale, to the plaintiff, and the defendant says that no goods remained unsold under the said bill of sale, and the said sum was all that has ever been realized thereunder, and the plaintiff accepted and received the said sum in full satisfaction of all the goods comprised in and sold under the said bill of sale, and of the proceeds thereof, and of all his claim in respect thereof, and of the cause of action herein pleaded to, and the plaintiff thereby before suit waived and abandoned all his claim and cause of action in respect of the alleged wrongful conversion, and discharged the defendant therefrom.

Issues.

At the trial which took place before Mellor, J., at the last Bristol Summer Assizes, the facts were as follows:—The defendant was the assignee under a bill of sale of furniture and other effects of William Dale, and, default having been made in the payment of the debt secured by the bill of sale, had sold the goods comprised therein as stated in the 3rd plea on the 4th of November, 1871. On the 10th of November, 1871, Dale was adjudicated a bankrupt. On the 7th of March, 1872, the plaintiff's attorney gave notice to the defendant that the County Court of Bristol, being the court in which the bankruptcy proceedings were pending, would be moved for an order that the bill of sale might be declared fraudulent and void as against the plaintiff as trustee, and the defendant might be ordered to pay over to the plaintiff all the moneys realized by the sale of such of the goods comprised in the said bill of sale as had been sold by him, and to deliver up such of the same goods as might still remain unsold, and to pay the costs of the said motion. The plaintiff made an affidavit in support of the motion in the county court setting out the facts connected with the making the bill of sale and the sale of the goods, and stating that though he had

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demanding of the defendant payment of the moneys produced by the sale the defendant declined to pay him the same. The County Court, on the 15th of March, 1872, made an order declaring the bill of sale fraudulent and void as against the plaintiff, and ordering that the defendant should pay the sum of 179*l.* 18*s.* 6*d.*, the gross amount realized thereunder, to the plaintiff. The amount so ordered to be paid was afterwards reduced to 157*l.* 6*s.*, the difference being the amount of rent due to the landlord of bankrupt's premises, and the reduced amount was paid over by the defendant to the plaintiff.

It was not denied that the bill of sale was void as against the plaintiff, but it was contended on behalf of the defendant that the plaintiff could not maintain trover after having applied for and obtained the proceeds of the sale of the goods under the bill of sale.

The verdict was entered for the plaintiff, the damages to be subsequently assessed, if necessary, and leave was reserved to move to enter a nonsuit, the Court having power to draw inferences of fact.

A rule nisi had been obtained accordingly.

Lopes, Q.C., and *Saunders*, shewed cause. It must be admitted that if the proceedings in the Court of Bankruptcy were equivalent to recovery in an action for money had and received, the plaintiff must be taken to have waived the tort, and cannot now maintain trover. It is contended that they were not so equivalent.

[They were then stopped by an intimation from the Court that they wished to hear the counsel in support of the rule, and that they should be heard further, if necessary, in reply.]

Cole, Q.C., and *Arthur Charles*, supported the rule. The plaintiff has waived the tort by his acts, and cannot now maintain trover. He can only be entitled to the proceeds of the sale on the footing that the defendant acted as his agent in selling the goods. Having received those, he cannot now say the sale was tortious: *Smith v. Hodson* (1); *Brewer v. Sparrow*. (2) *Burn v. Morris* (3)

(1) 2 Sm. L. C. 6th ed. 119.

(2) 7 B. & C. 310.

(3) 4 Tyr. 485.

is distinguishable from the present case on the same grounds as those upon which it was distinguishable from *Brewer v. Sparrow*. (1)

[BOVILL, C.J. Would receipt of the proceeds of a wrongful sale always waive the tort? Is it not rather a question of fact to be considered with relation to the circumstances of each case, whether there has been what amounts to an election to affirm the wrongful act?]

Admitting that it is a mixed question of law and fact, it is well settled upon all the authorities, that bringing an action for money had and received is a conclusive election to affirm the sale, inasmuch as it necessarily involves a recognition of the defendant as the plaintiff's agent in committing the tortious act: *Smith v. Hodson*. (2) It is submitted that the claim and recovery of the proceeds of the sale under s. 72 of the Bankruptcy Act, 1869, is exactly analogous to an action for money had and received. The Court of Bankruptcy is given a very wide jurisdiction by that section. It may apply any remedy which the justice of the case demands, for the purpose of a proper distribution of the estate. By demanding and recovering the proceeds of the sale in a judicial proceeding, the plaintiff irrevocably elects to waive the tort. It is submitted that even if the proceedings were not equivalent to an action for money had and received, as a matter of fact the evidence of an intention to affirm the transaction and consequent waiver of the tort is amply sufficient.

[BOVILL, C.J. The plaintiff expressly repudiates the transaction, and claims to have the bill of sale declared fraudulent and void.]

The same reasoning would apply in the case of the action for money had and received to recover the proceeds of the sale. The first step in such a case is to shew that the bill of sale is fraudulent and void, but then the tort is waived, and the plaintiff treats the defendant as his agent. The plaintiff disaffirms the bill of sale but not the sale itself.

The plaintiff might have brought trover for the goods; he might have proceeded in equity, or he might have claimed the full value of the goods in the Bankruptcy Court and not merely the proceeds of the sale. Having elected to proceed in the Bank-

(1) 7 B. & C. 310.

(2) 2 Sm. L. C. 6th ed. 119.

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ruptcy Court for the proceeds only, he cannot harass the defendant by further proceedings at law. [They also cited *Wilson v. Poulter* (1); *Lythgoe v. Vernon* (2); *Heilbut v. Nevill* (3); *Marks v. Feldman* (4); *Valpy v. Saunders*. (5)]

Lopes, Q.C., in reply. The real question is, whether the plaintiff can be considered as having intended to treat the defendant as his agent in making the sale. It would be impossible on a reasonable view of what he did to come to the conclusion that he did. He repudiated the transaction from the first, and claimed to have the bill of sale declared fraudulent and void. The trustee is entitled to go to the Court of Bankruptcy and claim the proceeds of the sale for the purpose of protecting the creditors. The proceeds form portion of the estate, being derived from goods which were assets applicable to the payment of the bankrupt's debts. If the proceeds could not be claimed on behalf of the creditors, they might be dissipated or disposed of, leaving only the right of action against the tortfeasor without any security for the creditors.

It is not putting a fair construction on the transaction to conclude that the receipt of the proceeds under these circumstances involved the abandonment of the right of the trustee to go for the difference between the proceeds and the real value of the goods by way of damages for the wrongful conversion. The proceeds are received merely in part of the value of the goods for which the defendant is responsible. The proceedings in bankruptcy are not equivalent to an action for money had and received. The reasoning applicable to the two cases is different. It would obviously be unjust that after bringing an action for money had and received, which involves the assumption that the plaintiff authorized the sale, the plaintiff should bring a fresh action of trover. [He cited *Morris v. Robinson*. (6)]

BOVILL, C.J. The question in this case is, whether there has been what amounts to an adoption of the wrongful act of the defendant by the plaintiff, whereby the plaintiff has waived his right

(1) 2 Str. 859.

(3) Law Rep. 5 C. P. 478.

(2) 5 H. & N. 180; 29 L. J. (Ex.)

(4) Law Rep. 5 Q. B. 275.

164.

(5) 5 C. B. 887; 17 L. J. (C.P.) 249.

(6) 3 B. & C. 196.

to sue for the tort. The defendant took possession of the goods, and sold them under a bill of sale, which was void as against the plaintiff as trustee of the bankrupt's estate. As between the bankrupt and the defendant the bill of sale was perfectly good, and the defendant had a right at the time of the sale to sell the goods subject to the possibility of the subsequent avoidance of the transaction in the event of a bankruptcy. The debtor almost immediately after the sale became bankrupt, and the plaintiff having determined, as trustee, to avoid the bill of sale, adopted proceedings in bankruptcy to make the defendant responsible for his act. The plaintiff was then at liberty to treat the sale as a tortious act, and to demand from the defendant the value of the goods and any damages resulting to the bankrupt's estate from such tortious act. He did not, however, commence any action at law for the tort, but resorted to the Court of Bankruptcy and made a successful application to have the bill of sale declared void. He further applied that the proceeds of the sale and any goods remaining unsold might be handed over to him, and obtained payment of the proceeds from the defendant; and the question now raised is as to the effect of his so acting. The law is clear that a person who is entitled to complain of a conversion of his property, but who prefers to waive the tort, may do so and bring his action for money had and received for the proceeds of goods wrongfully sold. The law implies, under such circumstances, a promise on the part of the tortfeasor that he will pay over the proceeds of the sale to the rightful owner. But if an action for money had and received is so brought, that is in point of law a conclusive election to waive the tort; and so the commencement of an action of trespass or trover is a conclusive election the other way. The principles which govern the subject are very well illustrated in the case of *Buckland v. Johnson* (1), where it is held that the plaintiff having sued one of two joint tortfeasors in tort could not afterwards sue the other for money had and received. There may be other instances where an act may amount to a conclusive election in point of law to waive the tort. But there is another class of cases in which an act is of an ambiguous character, and may or may not be done with the intention of adopting and affirming the wrongful act.

(1) 15 C. B. 145; 23 L. J. (C.P.) 204.

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In such cases the question whether the tort has been waived becomes rather a matter of fact than of law. Now it is contended in the present case that the proceedings in bankruptcy are equivalent to an action for money had and received. The language of the 72nd section of the Bankruptcy Act, 1869, is very wide. Power is thereby given to the Court of Bankruptcy to decide all questions which the Court may deem it necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any case of bankruptcy. If the defendant be right in his contention that the proceedings taken amounted to an action for money had and received, then clearly they form a bar to this action. If not, then the question is, what is the proper inference, treating the question as one of fact, as I am at present disposed to think that it ought to be treated, for us to draw from the plaintiff's proceedings as to whether there was a waiver or adoption of the tortious act of the defendant by the plaintiff. In treating the question as a matter of fact, of course we must be guided by the decisions on analogous cases as to what constitutes the waiver of a tort, but attention has been fully directed to all the authorities, and on consideration of the whole of the circumstances of the case I come to the conclusion, as a matter of fact, there was an affirmance of the act of selling the goods by the claim and receipt of the proceeds of the sale from the defendant, and that the plaintiff having therefore waived the tort cannot now maintain this action. The rule must, therefore, be made absolute.

KEATING, J. I am of the same opinion. It is admitted by the plaintiff's counsel, that if the plaintiff had brought an action for money had and received, that would amount to a conclusive election to waive the tort. That admission brings the whole question to the short point whether the proceedings that were taken in bankruptcy were equivalent to an action for money had and received. It appears to me that they were. The plaintiff claimed the proceeds of the sale in a judicial proceeding before a Court having full jurisdiction to entertain and decide all questions arising out of the transaction. The order for which he applied was made, and he took advantage of it, and received the proceeds of the sale. It seems to me that what he did is substantially equivalent to re-

covering the proceeds by an action for money had and received, which it is admitted would be a conclusive election to waive the tort. But bringing an action for money had and received is not the only way in which a tortious sale may be affirmed; and even if the proceedings in bankruptcy cannot be correctly regarded as equivalent to an action for money had and received, still I fully agree with my Lord that, treating the question as a matter of fact, there was, on the facts of this case, a clear affirmance of the wrongful sale. In some of the cases cited it was held that a claim to the proceeds of a wrongful sale and receipt of them might amount to affirmance of the sale. Here we have these and additional circumstances pointing in the same direction.

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HONYMAN, J. I also think the rule should be made absolute. As to the general rule of law there is no dispute. A man cannot at the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage. It is admitted, that if the proceedings in bankruptcy were equivalent to an action for money had and received, trover would not lie, for the only footing on which the plaintiff can recover in an action for money had and received is by waiving the tort and treating the defendant as his agent. The question therefore is, whether these proceedings were equivalent to such an action. The widest jurisdiction is conferred on the Court of Bankruptcy by the 72nd section of the Bankruptcy Act, 1869; and we find that the plaintiff resorted to that court, and, instead of claiming the value of the goods, claimed and received the proceeds of the sale, to which he could only be entitled on the footing that the defendant acted as his agent in selling. It seems to me that he thereby elected to take to the sale, and cannot now turn round and seek to treat it as a conversion of the goods.

Rule absolute.

Attorney for plaintiff: *Dix.*

Attorneys for defendants: *Gregory, Rowcliffes, & Rawle, for Benson & Elletson.*

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RUDGE v. RICHENS.

April 26.*Practice: Striking out Pleas—Mortgage: Mortgagee suing upon the Covenant, after having exercised Power of Sale.*

To a declaration by mortgagee against mortgagor for the balance due for principal and interest after sale under a power in the deed of the mortgaged property, the defendant pleaded, on equitable grounds, that, after default in payment of principal and interest, the plaintiff, pursuant to the covenants in the deed, entered into and took possession of the mortgaged premises, and sold the same, and so deprived the defendant of his right to have them re-conveyed to him on payment of the principal money and interest due.

A judge at chambers having struck out the plea, on the ground that it was a bad and dishonest plea, the Court refused to interfere.

ACTION for breach of covenant. The first count of the declaration stated that the defendant, by deed bearing date the 3rd of January, 1870, covenanted with the plaintiff to pay to the plaintiff on the third of July, 1870, the sum of 1500*l.*, with interest for the same in the meantime, after the rate of 5*l.* per cent. per annum, by equal half-yearly instalments, to be computed from the day of the date of the deed; and that, unless the said sum of 1500*l.* should be paid on the said 3rd of July, 1870, the defendant would pay to the plaintiff on the 3rd of January and the 3rd of July in every year during the continuance of such security, interest after the rate aforesaid on the said sum of 1500*l.* or on so much thereof as should for the time being be due, until the whole of the said sum of 1500*l.* should be fully paid: Averment that the said sum of 1500*l.* remained unpaid after the said 3rd of July, 1870, and was still unpaid, and 90*l.* for half-yearly instalments of the last-mentioned interest became due to the plaintiff, and was still unpaid.

Second count, for money lent and money found due on accounts stated.

Pleas,—1. Non est factum. 2. for a second plea to the first count, the same being for defence on equitable grounds,—that, at the time of the making of the deed, the defendant was in possession of certain leaseholds, and by the deed in the declaration mentioned the said leaseholds were conveyed to the plaintiff by way of mortgage for securing the moneys in the first count of the decla-

ration mentioned, which consisted of 1500*l.* lent by the plaintiff on the security of the said mortgage; and it was covenanted and agreed by and between the plaintiff and defendant in the said deed, that, if default should be made in payment of the said sum of 1500*l.*, or the interest thereof, or any part thereof respectively, by the defendant at the time mentioned in the first count, then it should be lawful for the plaintiff immediately thereupon, or at any time or times thereafter, without the receipt of any further consent or concurrence by or on the part of the defendant, to sell and absolutely dispose of the said leaseholds so conveyed as aforesaid; and the defendant said that, upon his making default in the payment of the said 1500*l.* and the interest due thereon, the plaintiff, pursuant to the covenants in the deed, entered into and took possession of the said leaseholds so mortgaged as aforesaid, and sold the same, and thereby realized and received, and still held, more than sufficient out of the proceeds of the said sale, after deducting expenses, to pay and satisfy herself all principal money and interest and all other moneys due to her under or by virtue of the deed, and which proceeds she lawfully could and ought to apply in satisfaction of the claim in the declaration mentioned.

3. For a third plea to the first count, the same being for defence on equitable grounds,—the defendant repeated the averments in the second plea and the covenant therein stated, and he said that, upon his making default in the payment of the 1500*l.* and the interest due thereon, the plaintiff, pursuant to the covenants in the deed, entered into and took possession of the said leaseholds so mortgaged as aforesaid, and sold the same, and thereby had deprived the defendant of his right to have the said property so mortgaged to the plaintiff as aforesaid re-conveyed to him, the defendant, upon payment of the money and interest due upon the mortgage, whereby the plaintiff had realized, received, and now held the proceeds of the said sale to pay and satisfy herself all principal moneys and interest and all other moneys due to her under and by virtue of the said deed, and was in equity satisfied before this suit by the said sale of the said leaseholds as aforesaid.

4. To the residue of the declaration, never indebted: 5. to the whole declaration, payment: 6. set-off.

These pleas had been allowed by a master, the plaintiff having

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leave to rejoin and demur. On the 4th of March, a summons was taken out before another master to strike out the third plea; the master refused to do so; but, on appeal, Bramwell, B., ordered it to be struck out, observing that it was a dishonest plea.

Oppenheim moved to rescind the order of Bramwell, B. The plea in question discloses a good defence in equity. Where a mortgagee has parted with the mortgaged property so as to put it out of his power to restore it to the mortgagor on payment of the principal and interest, equity will restrain him from proceeding to enforce the personal covenants contained in the deed: *Palmer v. Hendrie* (1); *Palmer v. Hendrie*, No. 2. (2) There, a mortgagee concurred with the transferee of the equity of redemption in selling the property, and he allowed the latter to receive the purchase-money; and the Court granted a perpetual injunction restraining the mortgagee from proceeding at law in respect of the mortgage-debt and interest. Lord Romilly, M.R., says (3): "If a man mortgages property and afterwards sells the equity of redemption to a third person, who then sells the property with the concurrence of the mortgagee, such mortgagee cannot, if he has allowed the purchaser of the equity of redemption to receive the purchase-money, sue the original mortgagor for the amount of the money which he has thus allowed to be paid to the purchaser of the equity of redemption. That is one of the first principles of equity." *Palmer v. Hendrie* was recognized and acted upon in *Walker v. Jones* (4), where Lord Justice Turner said (5): "It is clear that every mortgagor has the right to have a re-conveyance of the mortgaged property upon payment of the money due upon the mortgage, and that every mortgagee is charged with the duty of making such re-conveyance upon such payment being made. This, indeed, is no more than the necessary result of the relative positions of the parties, the mortgage being only a security for the debt." In this case the sale was not *bonâ fide*.

[KEATING, J. Why not raise that defence by plea?]

It is submitted that it is raised by the second plea.

(1) 27 Beav. 349.

(3) 28 Beav. 343.

(2) 28 Beav. 341.

(4) Law Rep. 1 P. C. 50.

(5) Law Rep. 1 P. C. at p. 61.

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[KEATING, J. Recourse cannot be had to the second plea to help the third. Does the deed contain a power of sale?]

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Yes. The facts are these:—The mortgagor having made default, the mortgagee, in exercise of the power of sale, sold the property for 1243*l.*, and she now seeks to recover 336*l.*, the balance of principal and interest said to remain due.

KEATING, J. This is an application to rescind an order of Bramwell, B., for striking out the third plea, on the ground that it is a dishonest plea. I think it is also a bad plea. The plea was allowed by Master Gordon. Then an application was made to Master Kay, not to set aside that order, but to strike out the third plea. Master Kay took the same view that Master Gordon had taken, and thought it better to allow the plea. Upon appeal to Bramwell, B., however, that learned judge entertained no doubt that the plea ought to be struck out. The action is brought upon a covenant for the payment of a sum of 1500*l.* and interest on a given day. Default having been made, the power of sale contained in the deed was exercised, and 1243*l.* was realized. There is no impeachment of the bona fides of that sale in this plea: but we are told that a Court of Equity would hold that the 1243*l.* honestly realized became a satisfaction of the claim, and that the mortgagee would be restrained from afterwards suing upon the covenant. The authorities which Mr. Oppenheim has cited do not support his proposition. All they shew is, that, where the claim of the mortgagee has been satisfied, the mortgagor is entitled to a re-conveyance of the property, and cannot be proceeded against upon the covenant. There is no doubt about that. We could not set aside the order of my Brother Bramwell unless we were satisfied that it was clearly wrong. So far from its being clearly wrong, in my opinion it was quite right.

GROVE, J. I am of the same opinion. The second plea seems fairly to raise the defence which the cases cited support. A Court of Equity would not allow the mortgagee to sue upon the covenant after he had so dealt with the property as to put it out of his power to re-convey it on being paid the principal and interest due upon the mortgage. But the third plea is a totally different thing.

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It alleges that, after default in payment of the principal and interest, the plaintiff (the mortgagee), pursuant to the covenants in the deed, entered into and took possession of the mortgaged premises, and sold the same, and so deprived the defendant of his right to have them re-conveyed to him on payment of the principal money and interest due. She had an undoubted right to exercise the power of sale, and she has done so. The plea is no answer to the action. If it could be shewn that there was no real sale, that would raise quite another defence.

DENMAN, J. I am of the same opinion. It was the duty of the judge when the pleas were before him to order this plea to be struck out, if he thought it was clearly a bad or dishonest one. I think this is clearly a bad plea. The cases cited have no application, or, if any, an adverse one. That is the sense in which the learned judge used the word dishonest.

Rule refused.

Attorneys for defendant: *H. F. & E. Chester.*

April 25;
June 13.

GOURLEY v. PLIMSOLL.

Practice—General Plea of Justification—Particulars—Time for Allowance of Interrogatories.

In an action for a libel substantially charging the plaintiff, a shipowner, with sending ships to sea over-insured, overloaded, and under-manned, and with an habitual disregard of human life in the conduct of his business, a judge at chambers allowed the defendant to plead general pleas of justification, "that the several words and matters concerning the plaintiff were true in substance and in fact," subject to particulars.

The Court sustained the order, holding it to be a more convenient course than setting out the several matters of justification upon the record.

An order having been made for the delivery by the defendant of particulars of the several matters he intended to rely on under his pleas of justification, stating the substance of each case, with the dates of the several matters relied on, or, in default, that the pleas should be struck out:—

The Court refused to allow him to administer interrogatories to the plaintiff for the purpose of enabling him to comply with the order, in the absence of an affidavit disclosing circumstances to warrant a departure from the general rule.

ACTION for a series of alleged libels. The first count of the declaration stated that, before and at the time of the committing

by the defendant of the several grievances thereafter alleged, the plaintiff was engaged very extensively in the business of a shipowner and merchant, and as such was possessed of many ships which traded between the ports of the United Kingdom and also between those ports and divers ports and places in foreign countries, &c.; that the defendant falsely and maliciously printed and published, and caused and procured to be printed, published, and circulated, of and concerning the plaintiff, and of and concerning him in relation to his aforesaid business, in a certain printed book, intitled "Our Seamen: An Appeal; by Samuel Plimsoll, M.P.," the false, scandalous, malicious, and defamatory words and matters following, that is to say,—

"Shipowners, as a class, are rarely careful of their men's lives, and neglect no means of safety known to them. . . . But there are in every large class of men some who need the law's restraint, who without it have no hesitation in exposing others to risk if by doing so they can augment their own profits. . . . Thus, suppose a ship will take 900 tons of cargo with safety, leaving her side one-third as high out of water as it is deep below it; and suppose further that the freight of 700 tons is absorbed by expenses,—wages of seamen, cost of fuel, wear and tear, interest of capital, cost of insurance, &c.,—leaving the freight on the remaining 200 tons as profit to the owner; it is clear that by loading an additional 200 tons the profits are doubled, while the load is only increased by about a quarter more. And this addition will not load her so deeply as to prevent her making a good voyage, if the weather is favourable. What wonder is there, I say, that needy or unscrupulous men adopt the larger load? They are safe in any case. If the vessel makes her port, they secure a very great profit. If she meets with rough weather and is lost, they recover her value (in too many instances far more than her value), and so go on again.

"Nor does the fear of losing the lives of the men operate so greatly upon these men's minds as it would if it were certain, or even probable, that, in all cases where the ship is lost, the men would be lost too. . . . Under these circumstances, it is not surprising that a few men are found amongst shipowners, who are not unwilling to expose their men to this diminished risk, where the gains of overloading are so large, and the risk to themselves nothing at all.

"It need not be said that such men have frequent losses; indeed, the losses we deplore are nearly all of this class; and I have heard one shipowner say that, if a small number of well-known shipowners were put aboard one of their own vessels when she was ready for sea, we should, in the event of bad weather, see that with them had disappeared from our annals nine-tenths of the losses we all deplore.

"In particular instances, such is the evil reputation which some bad men acquire, so generally are they known for their habitual overloading, for their terribly frequent and disastrous losses, for their cynical disregard of human life, that, after paying increasingly high rates of premium for insurance in the ports where they are known, the time sometimes comes when they can only insure in London, where they are as yet unknown, and, even there, after still further expe-

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rience, their names become so black with infamy that nobody will insure their risks at any premium ; and, where it is necessary in the course of business to insure cargo not yet purchased, as, corn or cotton abroad, or not yet ready for delivery, as, railroad iron for foreign, and when the ships are not taken up yet (in which case it is usual to say on the slip 'in a ship or ships'), the brokers dare not offer their ships in the room, or would have no chance of success if they did, unless they wrote under the usual particulars these damning words, 'Warranted not to be shipped in any vessels belonging to ——,' the blanks being filled up with the names of certain shipowners ; and I have seen slips so indorsed, and that, too, with names which (however well known by a few) stand fair in the eye of the world in which their infamous owners hold their heads very high indeed :"

The defendant thereby meaning that the plaintiff, as a ship-owner, needed the restraint and prohibition of the law and without being made subject to the penalties of the law would have no hesitation in exposing others to the risk of losing their lives, if by so doing he could augment his own profits, and that the plaintiff was a greedy and unscrupulous man, and would not scruple to ship too large a load in a vessel for the same to carry with safety to the ship and crew, if thereby he could enhance his own profits ; and habitually and wantonly ran the risk of causing the loss of his said ships and the deaths of the crews, for the purpose that in so doing he could augment his profits on such ships ; and that the plaintiff was one of the ship-owners who by such overloading wantonly and needlessly imperilled ships and men's lives and caused nearly all the losses of ships and of lives on the English coasts ; and that by over-insurance the plaintiff habitually made himself secure from loss in such a course of conduct ; and, further, that the plaintiff by such practices had acquired an evil reputation in his said business, and was generally known as one who habitually overloaded his ships ; and that he was also of evil reputation for terribly frequent and disastrous losses of ships and lives occasioned by his aforesaid practices, and for his cynical disregard of human life, in order to increase his pecuniary gains ; and that by reason of the premises the plaintiff's name in his said business had become so black with infamy that the insurance-brokers in London dared not offer risks for insurance unless they warranted that the cargoes were not to be carried in (amongst others) the plaintiff's ships ; and that the plaintiff, though his name stood fair in the eye of the world, and though he held his head very high, was in the trade, and among those who knew his business affairs and reputa-

tion and his aforesaid practices, of evil character and repute, and was in truth guilty of practices which justly rendered him infamous: Whereby the plaintiff was greatly injured in his name, character, and reputation, and in his said business, and was held up and exposed to public ignominy and disgrace, and was otherwise greatly damnified.

Third count, repeating all the prefatory averments in the first count,—that the defendant falsely and maliciously printed and published of and concerning the plaintiff, and of and concerning him in relation to his said business, in the said book, the false, &c., matters following,—

“There was one ship-owner whose name was often mentioned to me in the course of the years 1869 and 1870. During my inquiries in the north and east, I heard his name wherever I went as that of a ship-owner who was notorious for the practice of overloading, and for a reckless disregard of human life. I therefore made inquiry as to the ships belonging to him which had been lost, with the number of lives lost in each case; and the reply I received I will shew you. It is incomplete, you see: but sufficient is shewn to demonstrate the necessity of government interference. It is really awful to contemplate the loss of precious human life from the operations of this one man alone. . . .

“I will write to-night (Dec. 9th, 1872) to my informant, and will insert his reply when it reaches me. I now have it (Dec. 20th).

Date.	Ships lost.	Lives lost.
“1867.	S.S. C th.	—
1868.	A s.	—
”	V e.	29
”	F e.	10
”	V r.	—
1869.	L e.	28
”	P n.	—
”	C a.	22
”	H r.	16
”	M y.	—
”	A r.	Not known.
”	L s.	”

“20th February, 1871.

“Annexed I forward a more complete list of Mr. . . .’s losses, together with the number of lives sacrificed. I think I shall be able to send you a further list of sailing vessels: but a melancholy list of 105 lives lost will be almost enough evidence to produce against him.”

The defendant thereby meaning that the plaintiff was a ship-owner notorious for the practice of overloading his ships and for a systematic and reckless disregard of the lives of the crews of his

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said ships, and that by such overloading he had recklessly and wickedly sacrificed at least 105 lives out of the crews of his said ships, and more, the particulars of which were not known; and that it was awful to contemplate the loss of human life from the operations of the plaintiff alone in his said business; and that the plaintiff, on being threatened with exposure in the House of Commons, turned craven and coward and was conscience-struck at his own guilt: whereby the plaintiff suffered such damage as in the first count alleged."

There was a fifth count, setting out further libellous matter of a similar character, and professing to detail a conversation which the defendant had with the plaintiff with reference to a motion upon the subject before the House of Commons; concluding with a similar innuendo.

The defendant took out a summons before a Master for leave to plead the following pleas:—

1. Not guilty.
2. That the said several words and matters concerning the plaintiff, whether charged as the words of the defendant or as the words of another person or persons, are true in substance and in fact.
3. As to so much of the declaration as relates to the printing and publishing and causing and procuring to be printed and published, and to the writing, composing, and publishing by the defendant of the said alleged words and matters respectively, without the alleged respective meanings, that the said several words and matters concerning the plaintiff, whether charged as the words of the defendant or as the words of another person or persons, respectively are true in substance and in fact.

The master, notwithstanding that particulars were offered with the pleas, upon the authority of *I'Anson v. Stuart* (1) and the note thereto in 2 Smith's L. C., 5th ed. 64, 5, disallowed the second and third pleas.

Upon appeal to Cleasby, B., at chambers, the master's order was set aside and the pleas allowed, upon the authority of *Behrens v. Allen*. (2)

(1) 1 T. R. 748.

(2) 8 Jur. N. S. 118.

April 25. *Philbrick* moved for a rule calling upon the defendant to shew cause why the order of *Cleasby, B.*, should not be varied, by striking out so much thereof as allowed the defendant to plead the second and third pleas, they being so framed as to embarrass and prejudice the trial of the cause.

[*BOVILL, C.J.* It is the common mode of pleading, with particulars.]

Not, it is submitted, where the charge contained in the libel is general, and imputes an indictable offence. In the note to *I'Anson v. Stuart* (1), in 2 Smith's L. C. 65, it is said: "The plea to a declaration in slander or libel must contain a specific charge set forth with certainty and particularity: see *O'Brien v. Clement* (2), and *Hickinbotham v. Leach* (3) where Baron Alderson observed that 'the plea ought to state the charge with the same precision as in an indictment;' and that charge must be as extensive as the imputation complained of in the declaration: see *O'Brien v. Bryant* (4) and *Gregory v. Duke of Brunswick*. (5) Since the Common Law Procedure Act, 1852, a practice has prevailed of pleading in general terms that the matters in the declaration complained of are true in substance and in fact: see a form of such a plea, and the observations upon it, in *Bullen & Leake*, 1st ed. 432. This mode of pleading appears to be clearly insufficient where the libel or slander complained of does not consist of a distinct statement that particular facts have occurred, which statement may be deemed to be incorporated in the plea which asserts in general terms the truth of the libel; for, where the words in question do not amount to a statement of specific facts, but impute the commission of an offence, or general misconduct, there seems to be nothing in the recent legislation to destroy the common-law right of the plaintiff to have set out on the record the circumstances which are to be proved against him, and which are supposed to justify the particular imputation; so that he may obtain the opinion of the Court (and, if necessary, of a court of error,) upon the question whether these circumstances support the charge of which complaint is made. If this were not so, it would

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(1) 1 T. R. 748.

(4) 16 M. & W. 168; 16 L. J. (Ex.) 77.

(2) 16 M. & W. 159; 16 L. J. (Ex.) 76.

(5) 6 M. & G. 205.

(3) 10 M. & W. 361.

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be open to the defendant in every case of this description to deprive the plaintiff, by his mode of pleading, of the right to submit the justification to the Court as a matter of law, and to compel him to try before a jury (from whose decision error will not lie) the issue raised on the plea. A difference of opinion prevails among the judges as to whether this general mode of pleading ought in any case to be allowed." In *Behrens v. Allen* (1) the charge was not of an indictable offence; and Willes, J., says: "*TAnson v. Stuart* (2) makes it clear that, before the Common Law Procedure Act, 1852, a general plea of justification in these circumstances was not allowed, with the exception, possibly, of a case of a specific charge in the declaration, and a plea alleging the charge to be true. In such a case as this, where the charges are mostly specific, the real question may be raised by allowing a general plea of the part specified,—a general plea to that part, and a special plea to the other part. Nevertheless, I do not mean to say that on any future case I shall not reserve to myself to allow a plea of justification in libel on such terms as will oblige the parties to try the real question between them in the clearest possible form." In *Jones v. Bewicke* (3) the libel charged perjury, and the second plea alleged that the defamatory matter complained of was and is true in substance and in fact; and, upon a motion for particulars of the facts and matters the defendant relied on to justify the libel, Keating, J., said: "I doubt whether such a plea should be allowed at all. But, at all events, the plaintiff is entitled to particulars, in order to avoid unnecessary expense and miscarriage of justice:" and Montague Smith, J.; added: "The plea is clearly an embarrassing one, and ought not to be allowed without particulars."

[BOVILL, C.J. The charge there was of a criminal character, and general in its terms; the perjury imputed might have been committed at any time. In *Odger v. Mortimer* (4) the plea was general, and particulars were given: and, though the libel involved a charge amounting to treason, no inconvenience resulted.]

It is important to the plaintiff to have the justification placed upon the record, in order that there may be no doubt or difficulty

(1) 8 Jur. N. S. 118.

(2) 1 T. R. 748.

(3) Law Rep. 5 C. P. 32.

(4) Not reported,

in his refuting the charges made against him : See Bullen & Leake, 2nd ed. 613, n.

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BOVILL, C.J. I am of opinion that, as a general rule, the more convenient course in actions of libel is that which has been usually adopted in modern times, viz. that a plea of justification in a general form should be allowed, with full particulars of the matters intended to be relied on in justification. In olden times great inconvenience was sometimes felt when the plea of justification was required to be special. The ingenuity of special pleaders introduced so many matters which had no foundation in fact, that the defendant often succeeded in obtaining the judgment of the Court contrary to the merits. The real object of requiring the plea to be special was, that the plaintiff should know the case he had to meet at the trial. Every necessary information is given, and in my opinion in a more convenient way, by ordering particulars, which should be very liberally allowed. There may be cases in which this course would be inconvenient; but I see no advantage whatever that could result in a case like this from requiring the plea to be special. I think the order was rightly made, and that this application should be refused.

GROVE, J. I am of the same opinion. In my experience, a special plea of justification is very inconvenient. I never saw any substantial benefit from it. The real question between the parties can be just as well tried on a general plea, with particulars.

DENMAN, J. I also think the rule should be refused. The defendant is charged with having published a book containing libellous matter concerning the plaintiff. The declaration selects the passages which the plaintiff considers libellous. The defendant pleads that the said several words and matters concerning the plaintiff are true in substance and in fact. The question is whether a plea in that general form should be allowed. I think such a plea affords the fairest mode of trial, the plaintiff having power to obtain particulars of the occasions and circumstances upon which the defendant proposes to rest his justification, which particulars the Courts are always very liberal in granting. Mr. Philbrick has relied upon certain expressions used by my Brothers Keating and

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Montague Smith, J., in *Jones v. Bewicke* (1), to shew that a general plea ought not to be allowed where the libel imputes a criminal offence. But those expressions are to be understood as applicable to the particular facts then before the Court. I agree that there may be cases in which this course could not be conveniently adopted. But I am of opinion that this is not one of them.

Rule refused.

On the 30th of April, 1873, an order was made by a Master "that the defendant in three weeks deliver to the plaintiff's attorney particulars of the several matters he intends to rely on under the second plea, stating the substance of each case, with the dates of the several matters relied on, and also like particulars under the third plea; and, in default thereof, that such pleas be struck out."

That order having been served, the defendant took out a summons calling upon the plaintiff to shew cause why the defendant should not be at liberty to administer interrogatories to the plaintiff. This summons was on the 12th of May attended before Cleasby, B., by counsel on both sides (the only affidavit being the formal one required by the statute (2)), when the learned Baron held that the application for interrogatories was premature, the order for particulars not having been complied with, and declined to make an order.

A rule having been obtained calling upon the plaintiff to shew cause why the defendant should not be at liberty to administer interrogatories, upon an affidavit stating that the defendant, considering the strict terms of the order for particulars, will, unless he obtain the discovery sought by the interrogatories, be much embarrassed and have great difficulty in complying with the order; that, among the matters which the defendant intends to rely on are the losses at sea within three years of twelve ships of the plaintiff, named respectively *Christian IX*, *Admiral Kabris*, *Venice*, *Florence*, *Volunteer*, *Lucerne*, *Parthenon*, *Cambria*, *Harbinger*, *Missionary*, *Ancient Mariner*, and *Libertas*, and that, the order requiring the defendant to state "the substance of each case," will

(1) Law Rep. 5 C. P. 32.

(2) 17 & 18 Vict. c. 125, ss. 51, 52.

oblige the defendant to state, among other things, the causes of loss of each of the said respective ships, and the insurances on each, which are both matters peculiarly within the plaintiff's knowledge; and that, for the purpose of stating the defendant's case in the particulars to be delivered under the order, the defendant would derive material benefit from the discovery.

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June 13. *H. James, Q.C.*, and *Philbrick* (*The Attorney-General* with them), shewed cause. The pleas being incomplete without the particulars, this must be treated as an application for leave to administer interrogatories before pleading, which is never allowed without disclosing special circumstances. There are therefore two answers to this application. First; it is the invariable practice of the Courts not to review the decision of a judge at chambers unless it be clearly shewn that his discretion in granting or refusing an order has been exercised erroneously or mistakenly: *Edmunds v. Greenwood* (1); *Villeboisnet v. Tobin* (2); *Inman v. Jenkins*. (3) And even assuming that this is to be treated, not as an appeal from the decision of the learned judge, but as a substantive application for leave to administer interrogatories, the affidavit discloses no grounds which ought to induce the Court to grant such leave. The general practice of all the Courts is, not to allow interrogatories to be administered to a plaintiff until after issue joined, or at all events until after plea pleaded. The defendant has no right to interrogate the plaintiff in order to discover what defence he has to the action, but only to support his defence when he knows what it is. Here the defendant knew, or ought to have known, before he published the libel, what his defence is,—what is at least the substance of his justification; whereas, this application assumes that he has no evidence to sustain it. The plaintiff is entitled to know what was in the mind of the defendant when he wrote the libel, and ought not without special grounds to be called upon to afford the defendant by his answers to interrogatories a defence of which he is now ignorant.

Butt, Q.C., and *W. A. Lewis*, in support of the rule. The general principle as to the time for the delivery of particulars, and for

(1) Law Rep. 4 C. P. 70.

(2) Law Rep. 4 C. P. 184.

(3) Law Rep. 5 C. P. 738.

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administering interrogatories, is not disputed; and it may also be conceded that the pleas are incomplete without the particulars. But the complaint on the part of the defendant is, that the order for particulars imposes upon him a larger burthen than he would have had to take upon himself if his justification had been set out upon the record in the old form; and that he is unable to comply with it, unless furnished with the information he seeks by the interrogatories. The particulars will be incomplete without giving, besides the names of the several vessels, the dates and amounts of the several insurances upon each of them,—a thing which would be impossible without the assistance he would derive from the answers to the interrogatories.

BOVILL, C.J. In all cases of this sort, the judge to whom the application is made for leave to administer interrogatories should exercise his discretion as to whether the leave should be granted or not. There is no peremptory rule as to the stage of the cause in which the application is to be made; and, if it had appeared that the only ground on which the learned Baron refused to make an order was, that the application was premature, I should have thought that the rule should be made absolute. There seems to be some uncertainty as to what did actually take place at chambers; but that becomes immaterial if we deal with this as a substantive application. In many cases time is material; and, generally speaking, the summons for interrogatories will not be entertained until after issue joined. But that is only for the purpose of seeing that the proposed interrogatories are relevant to the matter in issue between the parties. The case of a libel is rather peculiar. The pleas of justification being general, they are for the purposes of the trial imperfect without particulars. The defendant is charged with having published statements which are said to be libellous and defamatory, containing distinct charges as to the plaintiff's conduct in his business of a ship-owner. The defendant undertakes to justify those statements. It must be assumed that he had some knowledge of the matters about which he was writing,—some information respecting the vessels to which he referred. His affidavit shews that he has no difficulty as to their names; and we may fairly assume that he would have no

difficulty in giving the dates of their sailing and of their loss, and particulars of the other matters in reference to them that are mentioned in his book. What the plaintiff is endeavouring by this motion to do, is, not to rely upon information which he possessed at the time of the publication of the alleged libel, but to ascertain what further facts he can extract from the plaintiff in the way of defence. It seems to me that that is not a legitimate course for the defendant to adopt. He is bound at all events, so far to complete his pleas as to give such particulars of the matters in question as he has the means of giving. We ought not to compel the plaintiff to give him a case of which he has at the present time no notion. When the defendant has delivered particulars as specific as his information enables him to deliver, it will be for a judge to say, upon an application for further and better particulars, whether they are sufficient, or whether from their vagueness the defendant is seeking to obtain an unfair advantage. The plaintiff will then, at all events, have the defendant's affidavit that he is not in a condition to give better information; and it will be for the judge to deal with the matter as he may think right. That being done, then will be the time for an application for leave to administer interrogatories to the plaintiff; and the judge will exercise his discretion upon that also. That I think will be the right course. It is quite contrary to the practice of the Court to allow interrogatories to be delivered in order to enable the defendant to make a defence of which he is altogether ignorant. The rule must be discharged; but I think the costs should be costs in the cause on both sides.

KEATING, J. I am of the same opinion. If my Brother Cleasby had ruled that under no circumstances could a defendant be allowed to administer interrogatories to the plaintiff before plea, I should have thought that this rule should have been made absolute. But all difficulty as to that is removed by the Court entertaining this as a substantive application. I must confess I think that to oblige the plaintiff to answer interrogatories at this stage of the cause would be imposing upon him a great hardship. It might enable the defendant to obtain from the plaintiff information as to other ships and other transactions as to which the former is at

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present wholly ignorant, and which could not legitimately be used to support his justification. I can easily conceive that interrogatories put to the plaintiff at this stage of the cause might materially embarrass him and give an undue advantage to the defendant. The defendant in his affidavit nowhere states that he is unable to give any particulars before he is allowed to administer interrogatories. At all events, I am satisfied that he should be compelled to give such particulars as he can; and, if they are found not to be reasonably sufficient, a further application must be made, and, if the defendant satisfies the judge that he has done all he can, there will be no order for further and better particulars. I agree with my Lord that that is the proper course to be taken, and that the costs of this rule should be costs in the cause.

BRETT, J. It is a fundamental rule that interrogatories are not to be allowed for the mere purpose of enabling the party to see if he has a case, but to enable him to support his case or to see if his case can be supported. The rule of practice is this,—not that interrogatories may not in any case be administered by the plaintiff before declaration, or by the defendant before plea, but that, if either wishes to administer them before declaration, or before plea, he must disclose the special circumstances upon which he means to rely as entitling him to do so. If the learned Baron here had ruled that in no case could the defendant be allowed to administer interrogatories before plea, I should have thought him wrong; but, if all he ruled was that he would not allow them without a disclosure of the circumstances which were relied on to take the case out of the general rule, I should have thought he was quite right. But it is unnecessary on this occasion to say whether he was right or wrong; because the case now stands before the Court as a substantive application for leave to administer interrogatories. The plaintiff complains of a libel. The defendant has not on the face of his pleas disclosed what his defence is; therefore this must be treated as an application for interrogatories before plea. In that case, the defendant is bound to disclose what his defence really is. No particulars have been delivered, and there is no defence disclosed on affidavit. The affidavit upon which this rule was granted does disclose a part of what the defendant

means to rely on, viz. the names of certain ships. But the libel goes further : it contains allegations as to the general conduct and habit of the plaintiff with regard to the insurance of his ships, and the defendant does not disclose what his defence is as to these matters. If the interrogatories were allowed, it would be to enable him to look for a case, not to support his defence, or see if he has a defence which can be supported. When he has disclosed as far as he can the real circumstances on which he means to rely for his justification, then will arise another question of discretion, viz. whether the interrogatories should be allowed, to enable him to support the case thus presented. Treating this as a substantial motion, I think the defendant should not be allowed to administer interrogatories when he has not disclosed what his defence to the action is. I therefore agree that the rule should be discharged, upon the terms mentioned by my Lord.

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GROVE, J. I am of the same opinion. One of the main charges contained in the libel is, that the plaintiff is "a ship-owner who is notorious for the practice of overloading his vessels, and for a reckless disregard of human life." It goes on,— "I made inquiry as to the ships belonging to him which had been lost, with the number of lives lost in each case ; and the reply I received I will shew you. It is incomplete you see ; but sufficient is shewn to demonstrate the necessity of government interference. It is really awful to contemplate the loss of precious human life from the operations of this one man alone." The letter referred to begins,— "I forward a more complete list of Mr. ——'s losses, together with the number of lives sacrificed. I think I shall be able to send you a further list of sailing vessels : but a melancholy list of 105 lives lost will be almost enough evidence to produce against him." This is a portion of the libel declared on in the third count. It may be a question whether the list annexed contains all the ships intended, or whether the defendant means to justify in respect of other vessels unnamed, and is waiting to know what evidence he is to give as to them. It seems to me to be reasonable that the defendant should give what information he possesses as to those. It may not be necessary that he should shew the exact date of the loss of each vessel, or the amount of insurance or overloading of each. The

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exact particulars of these matters he may not have the means of shewing. But he may give the substance of the evidence which he means to rely on for his justification. I do not see why he should not give that information: and, if that which he does give is reasonably sufficient, a judge at chambers might allow the interrogatories to enable him to give better particulars. It seems to me that the person who furnished him with the statement above referred to must be able to shew how he obtained it. The particulars need not be very full or exact: it will be enough if they are all that could be expected under the circumstances. The defendant must disclose his defence substantially before he is entitled to ask for interrogatories. To allow the interrogatories first would be to invert the order of things. The rule will therefore be discharged.

Rule discharged.

Attorneys for plaintiff: *Lowless, Nelson, & Jones.*

Attorneys for defendant: *Lewis, Munns, & Co.*

May 3.

IN RE CHAFFERS.

Practice—Office-Copies of Affidavits on Motions.

The Court will in no case dispense with the practice which requires a party shewing cause against a rule to take office-copies of the affidavits upon which it is moved.

GARTH, Q.C., in Hilary Term last, on behalf of the Incorporated Law Society, obtained a rule calling upon Mr. Chaffers to shew cause why he should not answer the matters in certain affidavits. The charge against him was that he, being an uncertificated attorney, had issued a writ in the name of another attorney, without his authority.

When the rule came on for argument, it was found that Mr. Chaffers had not taken office-copies of the affidavits on which it was moved, he alleging that he was unprovided with funds to pay the office charges. The Court required him to make an affidavit of the fact. An affidavit was accordingly produced, which, however, did not satisfy the Court.

BRETT, J. The question we had to consider in this case was, whether Mr. Chaffers could be heard to shew cause against the rule without obtaining office-copies of the affidavits upon which it was granted. The rule of practice is that cause shall in no case be shewn unless office-copies of the affidavits are obtained and paid for. The fees so payable are the property of the public, and it is the duty of the Court to see that the rule is not evaded. (1) That being a duty imposed by law upon the judges, we are not at liberty to abstain from the performance of that duty. It was alleged here that the party was unable, by reason of his poverty, to comply with the rule. The Court thereupon, though with much misgiving, in order that no real hardship should be imposed upon him, was inclined to allow him to shew cause upon production of an affidavit stating the fact of inability. After ample opportunity, Mr. Chaffers has made an affidavit to this effect,—that “I am not in a position to pay, and have not got 3*l.* or 4*l.*, which the officer of the Court has informed me will be the cost of the office-copy affidavits filed in this matter.” There is no assertion in that affidavit that the deponent cannot obtain the necessary funds to pay for the office-copies. There is nothing more than a statement that he has not 3*l.* or 4*l.* in his possession. I think it is wholly insufficient to absolve him from a compliance with the ordinary rule, and therefore that he cannot be heard.

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GROVE, J. In truth this Court has nothing whatever to do with the fees taken by its officers. (2) It is a matter of revenue, like a stamp upon a document offered in evidence, the want of which sometimes operates great hardship. But the Court felt inclined to go out of its way to help this person, if he could shew that his failure to obtain office-copies of the affidavits was the result of absolute inability to procure the necessary funds. I agree with my Brother Brett that this affidavit does not come within the mark. It ought at least to be such an affidavit that, if untrue, the deponent might be indicted upon it.

DENMAN, J. I entertain considerable doubt whether the Court

(1) See *Westmoreland v. Pike*, 1 Tyr. are provided for by a scale settled and
& G. 227. allowed by the Lords of the Treasury.

(2) The fees payable for office-copies

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did not go too far in making the concession it did this morning. The rule requiring office-copies of the affidavits to be taken is made for the protection of the revenue. But, supposing that what we did was not a stretch of power on our part, I am clearly of opinion that we ought not to extend it further upon such an affidavit as has now been produced.

Garth, Q.C., was then called upon to support the application.

The matter was referred to the Master, who, upon a subsequent day reported that Mr. Chaffers was reasonably justified in believing that he had the authority of the other attorney for using his name.

The Court, therefore, pronounced no rule.

Rule dropped.

Attorney for applicants: *Williamson*.

May 9.

HORSNAIL AND ANOTHER v. BRUCE.

County Court—Commitment for Disobedience of an Order for Payment of Money—County Court Act, 1846 (9 & 10 Vict. c. 95), ss. 98, 99, 103—Debtors Act, 1869 (32 & 33 Vict. c. 62), ss. 4, 5—Prohibition.

CPD 284-5, 236. A county court judge, on the 25th of November, 1872, made an order, under s. 5 of the Debtors Act, 1869, for the commitment of a debtor for forty days, for non-payment of debt and costs under a judgment. The debtor was arrested thereunder on the 30th of December, and discharged by a judge of a superior Court on the 6th of January, 1873, on the ground of privilege. The gaoler claiming to retain the warrant for his own protection, and the judge of the county court refusing to issue a second or duplicate warrant, a fresh judgment-summons was taken out, under which a second order of commitment for forty days for the non-payment of the same debt and the additional costs was issued on the 7th of March, 1873:—

Held, that the issuing of the second order of commitment pending the first was an excess of jurisdiction, and a prohibition was granted.

Semble, per Bovill, C.J., and Brett, J., that the power of a judge of a county court, under ss. 98, 99, and 103 of 9 & 10 Vict. c. 95, to commit more than once for the non-payment of a judgment debt, is virtually superseded by ss. 4 and 5 of the Debtors Act, 1869; and that it is now limited to a single commitment (not to exceed six weeks) for a single default,—each neglect, where the order is for payment by instalments, being deemed to be a fresh default.

RULE for a prohibition to restrain the judge and registrar of the City of London Court from proceeding upon an order of committal under s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 63).

On the 2nd of August, 1872, the plaintiffs recovered a judgment against the defendant in the City of London Court, for 17*l.* 7*s.* 4*d.*, debt and costs, payable forthwith. On the 25th of November, the judge of that court made an order under s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), for the defendant's committal for forty days for nonpayment of the above sum. The defendant was arrested under that order on the 30th of December, while returning from the petty sessions at Barnet, where he had been attending as prosecutor and witness, and was conveyed to Holloway gaol; and on the 6th of January, 1873, he was discharged by order of a judge, upon the ground of privilege.

On the 9th of January the plaintiffs applied to the judge of the City of London Court for a duplicate or another warrant for the fresh arrest of the defendant; which application was heard, and refused. The plaintiffs then removed the proceedings from the City of London Court to the county court of Barnet, within the jurisdiction of which the defendant then dwelt; and the defendant was summoned to attend that court on the 22nd of January, to answer for not having paid the debt and costs. Upon hearing the parties the judge of the Barnet court refused to make any order.

The plaintiffs afterwards applied *ex parte* to the City of London Court, and obtained the leave of the judge to serve the defendant with another judgment summons. The defendant attended that summons on the 7th of March, and contended that, an order of committal having already been made and executed against him for his default, no fresh order could be made under the Debtors Act, 1869; but the judge made an order for the defendant's committal for forty days. This order was for the same debt as the former, with the additional costs, in all 23*l.* 0*s.* 1*d.*

On the 29th of March, 1873, a summons was taken out before Cleasby, B., calling upon the judge and registrar of the City of London Court to shew cause why a writ of prohibition should not issue to prohibit them from proceeding upon or putting in force the last-mentioned order. The learned judge referred the parties to the Court.

A rule nisi having been accordingly obtained, on the ground that, the first order of committal being still in force, the second was without jurisdiction, and that, the defendant having already

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been imprisoned for six days under the first order, the second order of committal for forty days was in excess of the power of imprisonment conferred by s. 5 of the Debtors Act, 1869, viz. six weeks.

F. Turner shewed cause. The power of a judge of a county court under ss. 98, 99 of the Act of 1846, to commit for wilful disobedience of an order for payment of a debt, as qualified by ss. 4 and 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), is not limited to a single commitment, or to the period of forty-two days mentioned in s. 5 of the last-mentioned Act; or at all events these latter provisions do not apply under the circumstances of this case. By s. 103 of the Act of 1846, it was provided that "no imprisonment under this Act shall in anywise operate as a satisfaction or extinguishment of the debt or other cause of action on which a judgment has been obtained, or *protect the defendant from being anew summoned and imprisoned for any new fraud or other default rendering him liable to be imprisoned under this Act*, or deprive the plaintiff of any right to take out execution against the goods and chattels of the defendant, in the same manner as if such imprisonment had not taken place." By the Bankruptcy Repeal Act, 1869 (32 & 33 Vict. c. 83), s. 20 and sched., ss. 98 to 101, both inclusive, of the 9 & 10 Vict. c. 95, are repealed. The 4th section of the Debtors Act, 1869, enacts that, "with the exceptions hereinafter mentioned, no person shall after the commencement of this Act be arrested or imprisoned for making default in payment of a sum of money." One of the exceptions is as follows: "6. Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made:" and then comes the following proviso:—"Provided, first, that no person shall be imprisoned in any case excepted from the operation of this section, for a longer period than one year; and, secondly, that nothing in this section shall alter the effect of any judgment or order of any Court for payment of money, except as regards the arrest and imprisonment of the person making default in paying such money." The partial saving of the power of commitment is contained in s. 5, which enacts that, "subject to the provisions hereinafter mentioned, and to the prescribed rules,

any Court may commit to prison for a term not exceeding six weeks or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court." Taking these enactments together, the county court judge has power to commit for any period not exceeding six weeks at one time for a default such as is described in s. 4, subs. 6. Then comes a proviso: "Provided (1.) that the jurisdiction by this section given of committing a person to prison shall, in the case of any court other than the superior Courts of law and equity, be exercised only subject to the following restrictions; that is to say" (among others) "(c.) Be exercised only as respects a judgment of a county court by a county court judge or his deputy. (2.) That this jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same." "This section, so far as it relates to any county court, shall be deemed to be substituted for ss. 98 and 99 of the County Court Act, 1846, and that Act and the Acts amending the same shall be construed accordingly, and shall extend to orders made by the county court with respect to sums due in pursuance of any order or judgment of any court other than a county court. No imprisonment under this section shall operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place." It will be observed that this leaves untouched that part of s. 103 of the Act of 1846 which authorized the county court judge to make repeated orders of commitment "for any new fraud or other default." That part of s. 103, therefore, remains unrepealed.

[BOVILL, C.J. Sect. 103 of the Act of 1846 comes by way of proviso upon ss. 98 and 99. Those sections being repealed, by necessary implication the proviso falls with them; and that is not re-enacted in the Act of 1869.]

Unless there can be successive commitments, no sensible mean-

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ing can be given to the proviso in s. 4 of the Debtors Act, 1869, that "no person shall be imprisoned in any case excepted from the operation of this section, *for a longer period than one year.*"

[BRETT, J. Would not the defaults mentioned in the first four exceptions satisfy that part of the proviso?

GROVE, J. Has there been any instance of a second order of commitment by a judge of one of the superior Courts at Chambers? I have never heard of one.]

The 103rd section of the Act of 1846, and the seventh paragraph of the second proviso to s. 5 of the Act of 1869 may very well stand together.

[BOVILL, C.J. That part of the proviso is a re-enactment of so much of s. 99 of the Act of 1846 as is properly applicable to the Act of 1869. If your argument be correct, it will follow that there may be successive commitments, to the extent of twelve months in the whole, by the county court, but not by a superior Court. That never could have been intended.]

Nevertheless, if such be the correct construction of the language of the Act, there is no escaping from that consequence. The power to make successive orders of commitment under s. 103 of the Act of 1846 was expressly recognised by the Court of Queen's Bench in *In re Boyce*. (1) Many powers are given to police magistrates which are not possessed by judges of the superior Courts. Under the Vaccination Act, 30 & 31 Vict. c. 84, s. 31, there may be successive re-commitments for disobedience of the provisions of the Act: *Allan v. Worthy*. (2) So here, there is a continuing default.

[BOVILL, C.J. What power had the judge here to make the second order of commitment whilst the first was still in force? By the 16th of the rules made under the Debtors Act, 1869, the order is to be in force for one year from its date.]

They are not for the same default; the first order was for the non-payment of 17*l.* 7*s.* 4*d.* debt and costs; the second is for non-payment of 23*l.* 0*s.* 1*d.* It was impossible to proceed upon the first order. Upon the arrest of the debtor, the warrant, which is addressed to the gaoler, is delivered to him, and he retains it for his own protection. The judge in this case refused to allow a second

(1) 2 E. & B. 521; 22 L. J. (Q.B.) 393.

(2) Law Rep. 5 Q. B. 163.

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or duplicate warrant to be issued, but required the plaintiffs to take out a fresh judgment-summons.

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[BRETT, J. Are the plaintiffs to be deprived of the fruits of their judgment because the bailiff has thought fit to arrest the defendant improperly, and to deliver the warrant to the gaoler? Suppose he had taken the wrong man?]

The same difficulty would arise in that case. The bailiff could not afterwards arrest the right man without having the warrant.

Wetherfield, in support of the rule. No proceeding upon a judgment-summons can now be taken except under the Debtors Act, 1869; and that rests upon s. 5, which contains a positive enactment that there shall be but one commitment for default in payment of the judgment-debt, and that the period of commitment shall not exceed six weeks unless the sum due shall be sooner paid. He was stopped by the Court.

BOVILL, C.J. There is very great difficulty in construing this Act and ascertaining the intention of the legislature. After the argument the case has undergone, I have come to the conclusion, though with some diffidence, that the second order of commitment cannot be sustained. The main object of the Debtors Act, 1869, was, the abolishment of imprisonment for debt. Its title is, "An Act for the abolition of imprisonment for debt, for the punishment of fraudulent debtors, and for other purposes." Part I. has reference solely to "abolition of imprisonment for debt." Sect. 4 enacts, that, "with the exceptions hereinafter mentioned, no person shall after the commencement of this Act be arrested or imprisoned for making default in payment of a sum of money." Then follow six exceptions, the last of which is "default in payment of sums in respect of the payment of which orders are by this Act authorized to be made," which may possibly refer to the orders for payment by instalments referred to in s. 5. Such being the effect of s. 4, there is at the end of it this proviso,—“Provided, first, that no person shall be imprisoned in any case excepted from the operation of this section, for a longer period than one year; and, secondly, that nothing in this section shall alter the effect of any judgment or order for payment of money, except as regards the

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arrest and imprisonment of the person making default in paying such money." That may be satisfied by the ordinary process of the Court by attachment or execution. Notwithstanding the absolute abolition of imprisonment for debt, subject only to the exceptions I have referred to, power is given to order imprisonment in certain events; and this power is to be exercised under s. 5, which enacts that, "subject to the provisions hereinafter mentioned, and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court." There is no limitation here of the term of imprisonment, except six weeks, or until payment of the sum due: the proviso in s. 4 limiting the imprisonment to one year has no reference to default in payment of a debt due in pursuance of an order or judgment of any Court.

It is contended on behalf of the plaintiff that, even though there may be no order for the payment of a debt by instalments, there may still be several commitments for default in payment of a single debt. I find, however, no such authority in s. 5. The argument on the part of the plaintiff is that this is the true effect of that section read in connection with s. 103 of the Act of 1846, which is to be considered as incorporated therewith. That argument depends upon the meaning of the last paragraph but two of s. 5 of the Debtors Act, 1869, which provides that "this section, so far as it relates to any county court, shall be deemed to be substituted for ss. 98 and 99 of the County Court Act, 1846, and that Act and the Acts amending the same shall be construed accordingly, and shall extend to orders made by the county court with respect to sums due in pursuance of any order or judgment of any court other than a county court." Now, ss. 98 and 99 of the Act of 1684 are expressly repealed by the Bankruptcy Repeal Act, 1869 (32 & 33 Vict. c. 83), sched., which received the Royal assent on the same day as the Debtors Act, 1869; and s. 103 of the Act of 1841 coming by way of proviso on s. 99, to which all the intervening sections have reference, is repealed also; and it is at all events impliedly repealed by the Debtors Act, 1869. Sect. 5 of the last-mentioned Act re-enacts the greater part of s. 103 of the

Act of 1846. The part left out consists of these words: "or protect the defendant from being anew summoned and imprisoned for any new fraud or other default rendering him liable to imprisonment under this Act." Consequently those words are utterly inapplicable to cases under s. 5 of the Debtors Act, 1869; and the case of fraud is dealt with in Part II. of the Act, beginning with s. 11. It is a well known rule in the construction of statutes, that, if a substantive enactment in a former Act is repealed, that which comes by way of proviso upon it is impliedly repealed also. The result is, that, if there be a liability upon a judgment or order to pay a debt, the neglect to comply with it constitutes one default only, and not a continuing default; and, there being no provision in the Debtors Act, 1869, for a continuing default, the omitted words of s. 103 of the Act of 1846 are wholly inapplicable. Sect. 5 of the Debtors Act, 1869, provides that "for the purposes of this section, any Court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court to be paid by instalments, and may from time to time rescind or vary such order;" and there is a further proviso at the end that "any person imprisoned under this section shall be discharged out of custody upon a certificate signed in the prescribed manner to the effect that he has satisfied the debt *or instalment of a debt* in respect of which he was imprisoned, together with the prescribed cost, if any." Under that clause, to my mind, upon each case of default in payment of an instalment, there would be a fresh default and a fresh power of commitment for such default. In substance the limitation of the power of the county court judge to commit for default in payment of any debt or instalment, is provided for by the first part of s. 5, "not exceeding six weeks or until payment of the sum due." If this were not so, this extraordinary and absurd consequence would follow, viz. that a judge of a county court would have a power of repeated commitment for the same default, whereas a judge of a superior Court has no such power. The conclusion I have arrived at is that s. 5 authorizes one commitment for a period not exceeding six weeks for one default; and that, where the order is for payment of the debt by instalments, the party may in like manner be committed for each default. Here, the judge having made an order for the commitment of the defendant for default in

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payment of the whole debt, I am of opinion that he had no jurisdiction to issue a second for the same default, and therefore that the prohibition should go.

The fact of the first order having been handed over to the gaoler when the defendant was arrested under it does not justify the issuing of a second. I am not aware of any authority by which the gaoler was entitled to retain the warrant where the defendant has been discharged on the ground of privilege. There can be no reason for it. The discharge having taken place by process of the Court, nothing more could be needed for the gaoler's protection. At all events, he would be sufficiently protected by keeping a copy of the warrant, which might be proved by secondary evidence. I think the first warrant was improperly retained by the gaoler, and that the judge had no power to issue a second order. Besides, by rule 16 of the County Court Rules framed under the Debtors Act, 1869, the order of commitment is to continue in force only for one year from its date; and here the first order was dated the 25th of November, 1872, and the second on the 7th of March, 1873; so that the latter, if valid, would be in force for a period considerably beyond a year from the date of the original order.

BRETT, J. In this case an order had been made upon the defendant by the judge of the City of London Court for the payment of a sum for debt and costs forthwith. On the 7th of March, 1873, an order was made for the commitment of the defendant for forty days for default in payment of the debt and costs as ordered. It is contended on the part of the defendant that that warrant or order was issued without jurisdiction, and a prohibition is asked for. The ground upon which it is alleged that the last order was improperly issued is, that the judge had already on the 25th of November, 1872, committed the defendant for forty days for disobedience of the same order for payment, which order of commitment it is said is still unexecuted and in force. That raises the question whether the judge of a county court can, after having made an order for the commitment of a debtor for disobedience of an order for payment of debt and costs, and whilst that order still remains in force, make a second order of commitment for disobedience of the same order for payment. I am of opinion that

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he has no such power. The order of commitment in this case was made under s. 5 of the Debtors Act, 1869, which enacts that, "subject to the provisions hereinafter mentioned, and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court." That in terms applies to one order and one default only. It is to be observed that s. 4 of the Debtors Act, 1869, is a destructive section. It takes away powers which the county courts before had. Prior to the passing of that Act, a person might have been committed any number of times for default in payment of one judgment debt. Sect. 4 begins by taking away the power of arrest altogether, except with certain exceptions. One of those exceptions (subs. 6) is, "default in payment of sums in respect of which orders are in this Act authorized to be made." Sect. 5 is a constructive section; it is altogether new as applicable to the superior Courts, and comes by way of substitution as applicable to the county courts. As to the superior Courts, it for the first time gives them power to commit to prison for a term not exceeding six weeks or until payment of the sum due, for default in payment of any debt or instalment due in pursuance of any order or judgment of any competent Court. I entertain a strong opinion that that limits the power of the judge to commit to six weeks, subject to be shortened by payment within that period. That power is to be exercised in the case of any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment; and the 2nd proviso states "that such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same." It is not in all cases that this jurisdiction is to be exercised; but only where proof is given to the satisfaction of the Court that there is something like fraud or misconduct on the part of the debtor. The proviso goes on, "For the purposes of this section, any Court may direct any debt

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due from any person in pursuance of any order or judgment of that or any other competent Court to be paid by instalments." Supposing money to be ordered to be paid by a rule of Court without a judgment, that proviso gives power to the judge to direct payment by instalments, or to direct payment of a judgment debt by instalments; but it does not prevent a commitment for non-payment of money due upon a judgment.

It is suggested that there may be successive orders of commitment for default upon the same judgment, where there is no direction for payment by instalments; otherwise, it is said, no meaning is given to the proviso in s. 4 which fixes the limit of the period of imprisonment to one year. If it could have no other meaning, of course we should be bound so to construe it. But it seems to me that it has another meaning, and is applicable to commitments for the defaults referred to in the other subsections. Then it is said that the terms of s. 5 must be enlarged by being read in conjunction with the Act of 1846, and that the proviso expressly declares that that section shall be deemed to be substituted for ss. 98 and 99 of the former Act only. But it seems to me that the fallacy is in supposing that only certain parts of the section are to be so read. The whole of s. 5 is to be substituted for the former provisions as to imprisonment for default. If so, s. 5 is as much substituted for s. 103 of the Act of 1846 as for ss. 98 and 99. The power of ordering successive commitments for the same default being omitted in s. 5, the provision as to that is by construction repealed. It seems to me that section gives the power of issuing one order of commitment for disobedience of one order for payment; and that, if there be an order for payment by instalments, the nonpayment of each constitutes a disobedience of a separate order for payment: and I believe that in the majority of the districts the practice since the passing of the Debtors Act, 1869, has been consonant with that view. I therefore think the issuing of the second order in this case was beyond the power and authority of the judge. The first order is still a valid order, and is not in any way touched by the fact that it was irregularly put in force against the defendant whilst under privilege. If there be any difficulty in consequence of the retention of the warrant by the gaoler, the bailiff must get over it in the best way he can.

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The proper course probably would have been to issue a duplicate warrant. Instead of adopting that course, the plaintiffs took out a summons, and obtained a new order, on which a second warrant issued, which was to take effect from a different time. That order clearly was without jurisdiction, the first warrant being still in force and capable of being put in execution. The rule for a prohibition must be made absolute.

GROVE, J. I also think the rule should be made absolute: but I prefer to confine my judgment to the case actually before the Court; not that I differ from what has fallen from my Lord and my Brother Brett. I am clearly of opinion that the judge of the city court had no jurisdiction to issue the second order of commitment whilst the first remained unexecuted. I may observe that, if it be true that no second order of commitment can be issued after one imprisonment for a single default, one who is ordered to pay a debt by instalments, and who has paid several of those instalments, may be in a worse position than one who has paid nothing. Without, however, differing from the opinions expressed by the members of the Court who have preceded me, I rest my judgment on the second ground. Sect. 103 of the Act of 1846, even if incorporated with s. 5 of the Act of 1869, would not apply to this case, if this be not another default. I am of opinion that, where an order of commitment has been issued and remains unfulfilled, it is not competent to the court to issue another for the same default. The second order therefore was invalid and without jurisdiction. If it had been necessary, I should probably have agreed upon the first point: but, the first order being an existing and valid order, the second, which was issued during the pendency of the first, was clearly without jurisdiction.

HONYMAN, J. It is unnecessary to decide as to the competency of the judge to issue a second order of commitment for the same default. If it had been, although I do not differ from the rest of the Court, I should have been better pleased if the plaintiffs had been directed to declare in prohibition. I agree that the 6th subsection of s. 4 of the Debtors Act, 1869, is applicable to all the

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cases provided for by s. 5. But here, the first order of commitment not having been exhausted, the second was clearly without jurisdiction.

Rule absolute.

Attorney for plaintiffs: *James Popham.*

Attorney for defendant: *G. M. Wetherfield.*

April 25.

JAMES SIMSON AND WIFE *v.* THE LONDON GENERAL OMNIBUS COMPANY.

Negligence—Proprietors of public Carriage—Evidence for Jury.

64BD/49
157.
A passenger in an omnibus was injured by a blow from the hoof of one of the horses, which had kicked through the front panel of the vehicle. There was no evidence on the part of the plaintiff that the horse was a kicker; but it was proved that the panel bore marks of other kicks, and that no precaution had been taken, by the use of a kicking-strap or otherwise, against the possible consequences of a horse striking out, and no explanation was offered on the part of the defendants:—

Held, that there was evidence of negligence proper to be submitted to a jury.

FIRST count by husband and wife for injury to the wife through the defendants' negligence.

Second count by husband alone for loss of services of his wife.

Plea, not guilty. Issue thereon.

The cause was tried before Byles, J., at the sittings for Middlesex in Michaelmas Term last. The facts were as follows:—The female plaintiff was on the morning of the 22nd of June, 1872, a passenger in an omnibus belonging to the defendants from Bethnal Green to the Bank. She was at the end nearest the horses, when she received a violent blow on her back and shoulder, which was occasioned by one of the horses having kicked out and sent its hoof through the front of the omnibus. There was no evidence to shew that this particular horse was a vicious horse or a kicker; but, upon subsequent inspection, two marks as of kicks were found upon the front of the omnibus besides the perforation caused by the kick which injured the female plaintiff; and witnesses were called to shew that the consequences of a horse striking out might

have been obviated by the application of a kicking-strap or a kicking-board.

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On the part of the defendants (who called no witnesses) it was submitted that there was no evidence of negligence to go to the jury. The learned judge declined to nonsuit the plaintiff, or to reserve leave to move; and he left it to the jury to say whether the defendants had been guilty of negligence either in using a kicking horse or in abstaining from providing against that which may happen with any horse.

The jury returned a verdict for the plaintiffs, damages 50*l*.

A rule nisi having been obtained for a new trial on the ground that there was no evidence of negligence fit to be submitted to the jury.

Bompas (Parry, Serjt., with him,) shewed cause. The proprietors of a public vehicle, though they do not absolutely warrant the safety of their passengers, are bound to use reasonable care and adopt all reasonable means and appliances to make their carriages safe; and the natural inference arising from the happening of an accident is at all events sufficient to cast upon them the burthen of shewing that it arose from no want of reasonable care on their part: per Sir J. Mansfield, *Christie v. Griggs* (1); *Sharp v. Grey* (2); *Skinner v. London, Brighton, and South Coast Ry. Co.* (3); *Byrne v. Bodle* (4); *Scott v. London Dock Co.* (5); *Burns v. Cork and Bandon Ry. Co.* (6); per Erle, C.J., *Ford v. London and South Western Ry. Co.* (7); per M. Smith, J., *Stokes v. Eastern Counties Ry. Co.* (8); *Redhead v. Midland Ry. Co.* (9); *Bridges v. North London Ry. Co.* (10); *Stokes v. Saltonstall.* (11) Here there was abundant evidence of negligence, from the absence of an obvious precaution, viz. a kicking-strap. The learned judge could not have withdrawn the case from the jury.

(1) 2 Camp. 79.

(6) 13 Ir. C. L. Rep. 543.

(2) 9 Bing. 457.

(7) 2 F. & F. 730.

(3) 5 Ex. 787; 19 L. J. (Ex.) 162.

(8) 2 F. & F. 691.

(4) 2 H. & C. 722; 33 L. J. (Ex.) 13.

(9) Law Rep. 2 Q. B. 412; in error,

(5) 3 H. & C. 596; 34 L. J. (Ex.) 17,

Law Rep. 4 Q. B. 379.

220. *10 ju K.S. 1107, 1108.*

(10) Law Rep. 6 Q. B. 377.

(11) 13 Peters (U. S.) Rep. 181.

(41 Sc 10 ju K.S. 1107)

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Day, Q.C. (Giffard, Q.C., with him), in support of the rule. The only duty which the law imposes upon the proprietors of a public vehicle is, that they shall provide a reasonably sufficient carriage, and horses which are reasonably fit (so far as they have the means of knowing) to be used for the purpose of drawing it. A casual kick by one of the numerous horses they employ is no evidence of want of due and reasonable care on the part of the defendants. A horse which has never kicked before may do so once without acquiring the character of a vicious horse. This is not like the case of a barrel or a bale of goods falling from a warehouse, or a brick from a house in course of erection, it not being in the nature of such things to fall if properly slung or fixed. But, in case of the happening of an accident of this sort, the person complaining of negligence should be prepared to prove the cause of it. As to the suggestion of a kicking-strap, it is not the practice to apply them to horses drawing private carriages; and, is an omnibus proprietor bound to use a higher degree of care and caution in this respect than any gentleman adopts for the safety of himself and family? No doubt, the defendants would have been liable if they had been shewn to have knowingly used an unbroken horse or one which was known to be given to kicking; but the real question here is upon whom is thrown the burthen of proving that this horse was one which it was unsafe to drive in an omnibus.

[DENMAN, J. Is it not more reasonable that the onus should be cast upon the persons who have the means of knowing the temper of the horse, and who for profit to themselves put it in a position where it may do injury to a passenger, rather than upon one of the public who can know nothing about it?]

No doubt, the true question is upon whom is the burthen of proof.

BOVILL, C.J. It is quite true that the defendants do not absolutely warrant the safety of their passengers, or the absolute fitness of their carriages and horses; but that they are only bound to use reasonable care to provide for the passengers' safety. It is also true that the mere fact of the happening of an accident is not, as a general rule, even *primâ facie* evidence of negligence. But,

if the cause of the accident be shewn, it may or may not, according to circumstances, be evidence for the jury. In the case of a public carriage, the owner is bound to provide proper horses and such as will not unduly endanger his passengers. In the event of an accident arising from their unfitness, it is not necessary to shew that the owner was aware of such unfitness. In the present case, a horse drawing an omnibus belonging to the defendants, without any assignable cause kicks out, and strikes, and injures the female plaintiff, who was riding in the vehicle. It seems to me that that alone presents a case which calls for some explanation on the part of the proprietors. It is said that it is the nature of horses to kick. But I think it ought not to be the nature of a horse employed to draw a public vehicle to kick. Proof having been given that the horse in question had misconducted itself in the way charged, the burthen of shewing that he was not habitually a kicker, or something to account for his having kicked on this particular occasion, lay on the defendants. The mere fact of his having kicked out was, I should say, *prima facie* evidence for the jury. But there was further evidence. It was proved that there were marks of other kicks on the omnibus, besides that which was made on the occasion in question. It was left in doubt how those marks were produced. It was impossible to withdraw that evidence from the jury. The defendants might and ought to have explained it. And when it is said that all horses are prone to kick, and that a single act of kicking may be no fault in a horse, then it becomes a fair question for the jury whether, that being so, it was not the duty of the defendants to provide some means to guard against such a contingency, such as a kicking-strap or board. It is urged that it is not usual for private individuals to apply such contrivances to their carriage horses; but the answer to that is that private individuals generally take care to provide themselves with horses which do not kick. Where a horse from no assignable cause kicks out, I think the presumption is that he is a kicker. I think there was clearly evidence for the jury, and that the rule should be discharged.

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GROVE, J. I am of the same opinion, though I must confess I am not entirely free from doubt. If proving that a horse has on

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two occasions conducted himself as this horse did shews that he is a kicker, does not evidence that he has kicked upon one occasion, without anything to shew under what circumstances, afford some evidence that he is affected with that vice? It is a mere question of degree. The cases as to ferocious animals do not proceed on the ground of negligence. There, a scienter must be laid and proved. Besides, here there was evidence of other kick marks on the panel of the omnibus, and that, I think, threw upon the defendants the necessity of explaining how they came there. Upon the whole, I think there was evidence which my Brother Byles was bound to submit to the jury.

DENMAN, J. The rule in this case was not moved on the ground that the verdict was against the weight of evidence, but on the ground that there was no evidence of negligence on the part of the defendants which ought to be submitted to the jury. I am clearly of opinion that there was some evidence, and that without some explanation on the part of the defendants the jury could have come to no other conclusion.

Rule discharged.

Attorney for plaintiffs: *S. Miles Benson.*

Attorneys for defendants: *Stevens, Wilkinson, & Harries.*

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May 6.

Shipping—Construction of Charterparty—Warranty as to Time of Ship's Arrival at the Port of Loading—Pleading—Contemporaneous Agreement.

By a charterparty it was agreed that the ship *Ceres*, of the measurement, &c., "expected to be at Alexandria about 15th of December," being tight, &c., should "with all convenient speed" sail and proceed to that port, and there receive from the charterers a cargo of cotton-seed.

In an action against the owner, the breach alleged in the declaration was, that the said ship was not expected to be at Alexandria about the 15th of December, 1871, but was then in such part of the world and under such engagements that she could not perform those engagements and arrive at Alexandria about the said day :—

Held, a good breach,—the descriptive statement amounting to a warranty that the ship was in such a position that she might reasonably be expected to arrive at Alexandria by the day named.

Plea, that, at the time of making the charterparty, the ship was, to the plaintiff's knowledge, engaged for a certain voyage, and that the charterparty was made subject to a condition that she should with all convenient speed fulfil her engagement and then proceed to the port of loading, and that she did so :—

Held,—upon the authority of *Young v. Austen* (Law Rep. 4 C. P. 553),—a good plea.

DECLARATION, that an agreement or charterparty was made by and between the plaintiff and defendant, bearing date the 14th of November, 1871, which said agreement or charterparty was and is in the words and figures following, that is to say,

"London, 14th November, 1871.

"About 1000 tons cotton seed. Charterparty.

"It is this day mutually agreed between Messrs. Massey & Sawyer, of the good British steam-ship or vessel called the *Ceres*, &c., expected to be at Alexandria about 15th of December, and R. Corkling, of Manchester, merchant,—That the said ship, being tight, staunch, and strong, classed A. 1., and every way fitted for the voyage, shall (outward cargo for owner's benefit) with all convenient speed sail and proceed to Alexandria, Egypt, or so near thereunto as she may safely get, and there load from the agents of the charterers a full and complete cargo of cotton-seed, which the said merchants bind themselves to ship and send alongside as fast at the port of loading as the steamer can take it in, and, weather permitting, during ordinary working hours, and Sundays excepted,

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or demurrage to be paid, and take from alongside at the port of discharge at their own expense and risk, and the ship's boats and crew to render all customary assistance in towing the lighters, &c., not exceeding what she can reasonably stow and carry over and above her tackle &c.; and, being so loaded, shall therewith proceed to London, Bristol, Hull, or Grimsby, or as directed on signing bill of lading, or so near thereunto as she may safely get, and deliver the same afloat, on being paid freight in cash without discount, as follows: For cotton-seed per ton of 2240 lbs. or of 1015 kilograms gross weight delivered, 29s. sterling if for London or Bristol, and 28s. if for Hull or Grimsby, with 20l. gratuity, full of all primages, port-charges, and pilotage (the act of God, the Queen's enemies, restraints of princes, pirates, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage, being always excepted). The merchants engage to provide mats, and the ship the necessary wood for dunnage. Cash for ship's disbursements at the port of loading, not exceeding 350l., to be advanced free of interest and commission, and to be deducted from the freight, with cost of insurance thereon. Six running days are to be allowed the merchants (if the ship is not sooner dispatched) for unloading, and ten days on demurrage over and above the said laying days," &c., &c.

Averment, that the said Robert Corkling in the charterparty mentioned was and is the plaintiff, and the Massey therein mentioned was and is the defendant; and that all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the agreement performed by the defendant, and to maintain this action for the breaches thereafter alleged; yet the said ship was not then expected to be at Alexandria about the said 15th of December, 1871, but was then in such part of the world and under such engagements that the said ship could not perform her said engagements and arrive at Alexandria about the said day.

Third plea, that, before and at the time of the making of the alleged agreement the *Ceres* in the charterparty mentioned was on a passage to Revel and Helsingfors, and thence to load from Cronstadt or Riga for a port on the East coast of England or a port on the continent, and thence to proceed to Alexandria with a cargo

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from a coal port,—of all which the plaintiff had notice,—and that the alleged charterparty was made subject to the condition that the vessel should with all convenient speed fulfil her said engagements and then sail and proceed to Alexandria; and that the vessel did with all convenient speed fulfil her said engagements, and sail and proceed to Alexandria.

Demurrer to so much of the declaration as alleged as a breach that the ship was in such part of the world and under such engagements that she could not perform her said engagements and arrive at Alexandria about the said day,—on the ground that such breach was wrongly assigned.

Demurrer to the third plea, on the ground that the charterparty, being in writing, could not be varied by parol. Joinder.

Day, Q.C. (*Petheram* with him), for the plaintiff. The breach is well assigned. The words “expected to be at Alexandria about 15th of December” amount to a warranty that the ship is in such a position that she may be at Alexandria or may reasonably be expected to be there about that day: *Behn v. Burness*. (1) The plea raises the question which was decided by this Court in *Young v. Austen* (2), where a plea to an action against the acceptor of a bill of exchange, alleging a contemporaneous agreement (not alleging it to be in writing) that in a certain event, which occurred, the plaintiff would renew the bill, was held good. In that case, however, *Brown v. Wilkinson* (3), where the contrary was held in the Exchequer, was not cited.

[KEATING, J. We cannot overrule *Young v. Austen*. (4)]

Butt, Q.C. (*R. E. Webster* with him), contra. Unless the words in the charterparty “expected to be at Alexandria about 15th of December” amount to a warranty, the breach is clearly bad. *Behn v. Burness* (1) does not apply. The nearest case to this is *Barker v. Windle*. (5) There, to an action for not loading a ship according to the terms of a charterparty in which the plaintiff was described as “of the ship *Avance*, of the measurement of 180 to 200

(1) 3 B. & S. 751; 32 L. J. (Q. B.)
204. *2 Jan 45. 520*

(2) Law Rep. 4 C. P. 553

(3) 13 M. & W. 14.

(4) Law Rep. 4 C. P. 553.

(5) 6 E. & B. 675; 25 L. J. (Q. B.)
249. *2 Jan 45. 1509*

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tons, or thereabouts," the defendants pleaded that by the said charterparty the ship was *warranted* to be of the measurement of 180 to 200 tons, or thereabouts, and that the ship was of a measurement greatly and unreasonably exceeding 200 tons, and was not of the measurement of 180 to 200 tons or thereabouts, wherefore the defendant did not load, &c. It was held that the plea was not proved, inasmuch as the statement of tonnage in the charterparty was a matter of description only, and did not amount to a warranty. Jervis, C.J., there says (1): "There was, no doubt, a variance to some extent between the actual tonnage of the ship and the statement of it in the charterparty. That variance, even if it had been to the extent of only a single ton, would have been fatal if such statement amounted to a warranty. But, looking at the whole of the contract, and the intention of the parties as it appears upon the instrument, I think that this statement was not intended as a warranty, but merely as a matter of description, which has been practically complied with." And Willes, J., said (2): "I think there was no warranty of the tonnage: the statement in the charterparty was nothing more than a representation of the belief of the owners upon that point, the vessel being ascertained and fixed by their description." So here, the words relied upon amount merely to a hope or expectation that the vessel may arrive at Alexandria about the day named.

[HONYMAN, J., referred to *Ollive v. Booker*. (3)]

According to *Harris v. Mantle* (4), the latter words of the breach, commencing with "but," limit the effect of the preceding part. The demurrer is substantially to the whole breach.

Day, Q.C., in reply. The judgment of Martin, B., in *Barker v. Windle* (5), shews that this is not mere matter of description but a warranty. If it is not part of the contract, there is no time at all stipulated for the commencement of the voyage.

[HONYMAN, J., referred to *Seeger v. Duthie*. (6)]

KEATING, J. With respect to the demurrer to the third plea,

(1) 6 E. & B. at p. 679.

(2) 6 E. & B., at p. 681.

(3) 1 Exch. 416; 17 L. J. (Ex.) 21.

(4) 3 T. R. 307.

(5) 6 E. & B. 675; 25 L. J. (Q. B.) 249.

(6) 8 C. B. (N. S.) 45, 72; 29 L. J. (C. P.) 253; 30 L. J. (C. P.) 65.

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we have already expressed our opinion that the plea is a good one. It rests upon the decision of this Court in *Young v. Austen* (1), and we are not disposed to interfere with that decision. The main point discussed before us was with reference to the breach assigned in the declaration. Now, the declaration sets out a charterparty by which the owner agrees that the *Ceres*, "expected to be at Alexandria about the 15th of December, 1871," shall "with all convenient speed" sail and proceed to that port, and there receive from the charterer a cargo of cotton-seed. The breach, treating that first statement as part of the contract, alleges that the said ship was not expected to be at Alexandria about the said 15th of December, 1871, but was then in such part of the world and under such engagements that she could not perform those engagements and arrive at Alexandria about that day. The question is whether these words "expected to be at Alexandria about the 15th of December, 1871," are words merely of description, which were not intended to enter into the contract, or are in the nature of a warranty. I am of opinion that they amount to a warranty that the ship was expected to be at Alexandria about the day named, and that the breach is well assigned. The words are doubtless somewhat vague; and I must own that I have felt some difficulty as to the proper construction which they ought to receive, and that that difficulty is not entirely removed from my mind. But, upon the whole, I think the proper conclusion is that they form part of the contract. What weighs with me is this, that it must be of the utmost importance to the charterer to know when the ship is to be at the port of loading. It is a statement which one would expect to find in all charterparties. If the words "expected to be at Alexandria about the 15th of December" do not amount to a contract that the ship is to be there, or that she is in such a part of the world that she may be reasonably expected to be there, about that time, there is no undertaking as to the position of the ship at all, and the charterer is wholly at the mercy of the ship-owner. I should hesitate to adopt a construction which would lead to such a consequence, unless forced to do so by the plain words of the contract; and I think we do no violence to the language of

(1) Law Rep. 4 C. P. 553.

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this charterparty in holding those words to be in the nature of a warranty. It is not necessary to say that they amount to a condition. The distinction between a warranty and a condition is well pointed out in the very elaborate judgment of Williams, J., in the Exchequer Chamber, in *Behn v. Burness* (1), to which it will be sufficient to refer. I think the proper construction of this charterparty is that the statement as to the expectation of the ship's arrival at the port of loading is in the nature of a warranty, giving the charterer a cause of action for a breach of it, and that the breach is well assigned. I therefore think there ought to be judgment for the plaintiff on the demurrer to the declaration, and for the defendant on the demurrer to the plea.

HONYMAN, J. I am of the same opinion. As to the plea, *Young v. Austen* (2) is in point, and we are bound by it. As to the declaration, the statement about Alexandria is, I think, part of the contract. It is the only thing to enable the charterer to know when to have the cargo ready. The ship-owner undertakes that the ship is in such a position that she may reasonably be expected to be at Alexandria about the 15th of December, 1871. I do not see much difference between this case and *Gorrissen v. Perrin*. (3) There, A. contracted to sell to B. 1170 bales of Gambier "now on passage from Singapore, and expected to arrive in London, viz. per *Ravenscraig*, 805 bales, per *Lady Agnes Duff*, 365 bales:" and it was held that this was a warranty that the goods were *then on passage*. So, in *Oliver v. Fielden* (4), where the vessel was described in the charterparty as "ready to receive cargo in all May," it was held that the readiness to receive a cargo in all May was a condition precedent to the plaintiff's right to recover for not loading a full cargo, that statement not being a mere description, but part of the contract. It is unnecessary to say whether, if this had been an action for not loading a cargo, it would have been any answer to say that the vessel was not expected to arrive at Alexandria about the 15th of December. The distinction is well pointed out by Williams, J., in delivering the judgment of the Exchequer

(1) 3 B. & S. 751; 32 L. J. (Q. B.)
204; *per H. S. 620*

(2) Law Rep. 4 C. P. 553.

(3) 2 C. B. (N. S.) 681; 27 L. J.
(C. P.) 29.

(4) 4 Ex. 135; 18 L. J. (Ex.) 353.

Chamber in *Behn v. Burness*. (1) I agree that there should be judgment for the plaintiff on the demurrer to the declaration, and for the defendant on the demurrer to the plea.

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Judgments accordingly.

Attorneys for plaintiff: *W. A. Waller & Hardson.*

Attorneys for defendant: *Pritchard & Sons.*

PRETTY AND WIFE v. BICKMORE.

May 7.

Nuisance—Insecure Coal-plate in a public Footway—Liability to repair—Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 102.

The defendant let premises to a tenant under a lease by which the latter covenanted to keep them in repair. Attached to the house was a coal cellar under the footway, with an aperture covered by an iron plate which was at the time of the demise out of repair and dangerous. A passer by in consequence fell into the aperture and was injured:—

Held, that, the obligation to repair being by the lease cast upon the tenant, the landlord was not liable for this accident.

Held also, that the provision in s. 102 of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), makes no difference in this respect.

THE first count of the declaration stated that the defendant, being possessed of a messuage with an arched area and vault in front belonging thereto, in which a certain iron coal-plate was affixed over an aperture in the covering of the said vault (and which said covering was for the protection of persons using the highway there) in, under, and abutting on a highway, wrongfully, knowingly, negligently, and improperly suffered the said coal-plate and the fastening of the said coal-plate, with the stonework surrounding the same, to become and the same were out of repair and a dangerous nuisance to persons lawfully passing on and along the highway, and, whilst the same were such a dangerous nuisance as aforesaid, the defendant let the said messuage, area, and vault to a tenant without requiring and obliging the tenant to repair the same, and without requiring and obliging the tenant to repair the coal-plate and the fastening of such plate together with the stone-

(1) 3 B. & S. 751; 32 L. J. (Q. B.) 204.

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work surrounding the same: by means of which premises and of the wrongful and negligent conduct of the defendant in that behalf, the female plaintiff, at the time she was the wife of the male plaintiff, whilst passing along the said highway, and whilst the said messuage, area, vault, and premises were in the possession of the tenant of the defendant, and whilst the defendant was entitled to the premises subject to the said tenancy, fell through the said aperture from the said highway into the area or vault, and was greatly hurt, &c.

Second count, that, before the committing of the grievances thereafter mentioned, the defendant, being possessed of the said messuage, area, and vault belonging thereto, in which a certain iron coal-plate was affixed over an aperture in the covering of the said area and vault (which said covering was for the protection of persons using the said highway there) in and abutting upon such highway, let the same to a tenant upon the terms that the defendant should and would put and would keep the said covering of the said area and vault and the said coal-plate and its fastening and surrounding stone-work in repair; and the said messuage, area, and vault were at the time of the committing of the said grievances in the possession of the said tenant of the defendant as the defendant's tenant on the terms aforesaid: yet the defendant wrongfully neglected to put and to keep the area and vault and the coal-plate and its fastening and surrounding stone-work in repair, and wrongfully and knowingly permitted the same to become and the same then were out of repair and a dangerous nuisance to persons lawfully using the highway: by reason of which premises, &c., as in the first count.

Third count, that, after the making, passing, and coming into operation of the Act for the better local management of the Metropolis, 1855 (18 & 19 Vict. c. 120), and of divers Acts amending the same, and of divers orders in council made under and by virtue of the said Acts and Act, and at the time of the committing of the grievances thereafter alleged, the defendant was the owner within the intent and meaning of the said Acts and Act of a house and premises to which was then belonging a certain vault, arch, and cellar made either before or after the commencement of the said Act or Acts under a certain street situate and

being in a parish and district subject to the said Act, Acts, and orders in council, into which said vault, arch, and cellar there was at the time aforesaid an opening in the said street; and that, under and by virtue of the said Act, Acts, and orders in council, it became and was the duty of the defendant to repair and keep in proper order the said vault, arch, and cellar, and all openings thereto in any such street as aforesaid: yet the defendant, being such owner as aforesaid, did not repair and keep in proper order the said vault, arch, and cellar, and all the openings into the same in the said street; whereby the female plaintiff, at the time she was the wife of the male plaintiff, whilst passing along the said street, fell through the said opening in the said street into the said vault, arch, and cellar, and sustained such hurt, &c., and incurred such expenses, &c., as in the first count mentioned.

Pleas,—1. not guilty; 2. not possessed; 3., to first and second counts, that the defendant did not let the messuage, area, and vault on the terms alleged; 4., to third count, that the defendant was not the owner of the said house, vault, arch, cellar, opening, and premises, or bound to repair and keep in proper order the same, within the meaning of the Act, as in the third count alleged. Issue thereon.

The cause was tried before Brett, J., at the last sitting at Westminster in this term. The facts were as follows:—The defendant was the owner of a house in Boundary Road, St. John's Wood, which he let in June last to one Kay on a lease for twenty-one years, determinable at the end of the first seven or fourteen years, at the yearly rent of 65*l.*, payable quarterly, with a covenant by the lessee to keep the premises in repair; the lessor having agreed to put them in repair and convert the lower part into a shop. Kay entered into possession of the premises and paid rent. Connected with the premises was a coal-cellar under the foot-path of the public highway, the flap or iron covering of the hole or shoot whereof was at the time of the demise out of repair so as to be dangerous. The female plaintiff, walking along the foot-way, stepped upon the flap, which gave way, and she was injured. At the time of the accident the defendant's workmen were still executing the repairs which he had stipulated to do. But the tenant had entered into possession and paid rent.

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The learned judge ruled that, as the duty of keeping the premises in repair was by the lease cast upon the tenant, the defendant, the landlord, was not liable; and he directed a nonsuit.

C. Foster moved for a new trial, on the ground of misdirection. He submitted that, the duty of *putting the premises into repair* being thrown upon the landlord, the action properly lay against him, to avoid circuitry: *Payne v. Rogers* (1); *Rex v. Peddy* (2); *Todd v. Flight* (3); *Gandy v. Jubber*. (4) He also referred to s. 102 of the Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120.

BOVILL, C.J. I am of opinion that the nonsuit was right. The person who is in possession of the premises and who allows the coal-plate to be in a dangerous condition is the person responsible to the public for any injury resulting from its being out of repair. The defendant was not in possession: he had let the premises to a tenant who was bound by his covenant to maintain and repair them. *Primâ facie*, therefore, the person liable was the tenant. In all the cases where the landlord has been held to be responsible, it will be found that he has done some act authorizing the continuance of the dangerous state of the premises. The ground of the decision in *Todd v. Flight* (3) was, that the declaration contained an allegation that the defendant let the houses when the chimneys were known by him to be ruinous and in danger of falling, and that he kept and maintained them in that state (which allegation must on demurrer be assumed to be true); "and thus," says Erle, C.J., "he was guilty of the wrongful non-repair which led to the damage, and after the demise the fall appears to have arisen from no fault of the lessee, but by the laws of nature." That is wholly inapplicable to the present case; nor are any of the other cases which have been cited. Here, the coal-plate was, it seems, in a dangerous and unsafe state; and the defendant let the premises to a tenant who covenanted to maintain and keep them in repair. Under these circumstances, how can it be said that the defendant authorized the thing to be kept in a dangerous state?

(1) 2 H. Bl. 351.

(2) 1 Ad. & E. 822.

(4) 5 B. & S. 78; 33 L. J. (Q. B.) 151; and see 9 B. & S. 15, n.

(3) 9 C. B. (N. S.) 377; 30 L. J. (C. P.) 21.

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The simple question is, whether it was the wrongful act of the landlord or of the tenant. Mr. Campbell Foster says that the tenant was not bound to repair it. I differ from him. The tenant, knowing that the coal-shoot wanted repair, was bound to put it in a safe and proper state. I think there was no obligation on the lessor to do it, and that the lessee would have no remedy over against him. If the duty of repairing had rested upon the landlord, no doubt he would have been liable. But I see no evidence of that, and therefore I think the nonsuit was right.

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KEATING, J. I also am of opinion that the nonsuit was right. In order to render the landlord liable in a case of this sort, there must be some evidence that he authorized the continuance of this coal-shoot in an insecure state; for instance, that he retained the obligation to repair the premises: that might be a circumstance to shew that he authorized the continuance of the nuisance. There was no such obligation here. The landlord had parted with the possession of the premises to a tenant, who had entered into a covenant to repair.

HONYMAN, J. I am of the same opinion. *Primâ facie*, the occupier of the premises is the person liable for such an act of omission as this. If he seeks to shift the liability to his landlord, he must shew some circumstances such as those referred to at the end of the judgment of Erle, C.J., in *Todd v. Flight*. (1) If the tenant be under no obligation to repair, the landlord may be liable: but, if the tenant undertakes to keep the premises in repair, he thereby relieves the landlord from responsibility.

Rule refused.

Attorney for plaintiff: *T. Johnson.*

(1) 9 C. B. (N. S.) 377; 30 L. J. (C. P.) 21.

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HARDWICK AND OTHERS, PETITIONERS; BROWN, RESPONDENT.

May 7.

Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 40)—
Election of Town Councillor—Disqualification by Composition with Creditors
—Municipal Corporations Act (5 & 6 Wm. 4, c. 76), s. 52—Debtors Act,
1869 (32 & 33 Vict. c. 62), s. 21—Bankruptcy Act, 1869 (32 & 33 Vict.
c. 71), s. 126.

By s. 52 of the Municipal Corporations Act, 5 & 6 Wm. 4, c. 76, it is enacted that a town councillor who becomes bankrupt or compounds with his creditors by deed, shall "thereupon immediately become disqualified and shall cease to hold the office of such councillor," and "the council thereupon shall forthwith declare the office void, and shall signify the same by notice, &c., and the said office shall thereupon become void;" but that "every person so becoming disqualified and ceasing to hold such office on account of his being so declared bankrupt or having compounded with his creditors as aforesaid, shall, on obtaining his certificate, or on payment of his debts in full, be capable of being re-elected to such office." And by s. 21 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), those provisions are extended to persons who have compounded with their creditors "whether by deed or otherwise."

B., a town-councillor of Newcastle, in July, 1872, made a composition with his creditors under s. 126 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), under which a resolution was come to for a composition of 3s. 6d. in the pound (secured) in satisfaction of B.'s debts, the first instalment of which was payable six months after registration of the confirming resolution. The registration took place on the 23rd of September. On the 4th of November, B., placed his resignation of his office of councillor in the hands of the town-clerk, and announced his resignation by advertisement on the 6th of November, and by the same advertisement offered himself for re-election. At the annual meeting of the town-council on the 9th of November, the above letter was read, and B.'s resignation was accepted by the council; and on the 18th (there having been no declaration by the council that the office was void) he was re-elected a town councillor.

Upon a case stated for the opinion of the Court, pursuant to s. 15 of the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 40):—

Held, that B., having by reason of his having compounded with his creditors ceased to hold the office of councillor, was incapable of resigning it, and, the council not having pursued the course pointed out by s. 52 of the Municipal Corporations Act, that the election was therefore void.

Held, also, that B. not having "paid his debts in full," he was not qualified for re-election under that section.

CASE stated for the opinion of the Court under the Corrupt Practices (Municipal Elections) Act, 1872, 35 & 36 Vict. c. 40, s. 15, subs. 6.:—

The respondent, Peter Brown, of Newcastle-upon-Tyne, mer-

chant, was duly elected councillor for the ward of East All Saints, in the borough of Newcastle-upon-Tyne, at an election holden on the 1st of November, 1870, and continued in the office until his resignation, which took place under the circumstances hereinafter stated.

On the 30th of July, 1872, the respondent and John Henry Brown, with whom he was at that time in partnership, filed a joint petition under ss. 125 and 126 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 62), in the county court of Northumberland holden at Newcastle, for the liquidation of their affairs by arrangement or composition with their creditors. Proceedings were accordingly taken under s. 126, for a composition of their debts; and at an adjourned meeting of their creditors held on the 12th of September, 1872, resolutions were passed in the manner provided by that section, whereby it was agreed that a composition should be accepted by the creditors of 3s. 6d. in the pound, payable as follows,—1s. at six months from the date of the registration of the resolution passed at the second general meeting, 1s. at twelve months, 6d. at eighteen months, 6d. at twenty-four months, and 6d. at thirty months from the said date; to be secured by the promissory notes of certain persons, and a reversionary interest of the debtors in certain real property. The confirming resolution was duly registered on the 23rd of September, 1872.

The respondent and the several persons mentioned in the resolution had at the date of the presenting of the petition the subject of this case duly performed the several requirements and conditions contained therein so far as the same had to be performed at that date; but the respondent had not paid his debts in full.

On or about the 4th of November, 1872, the respondent placed his resignation of his said office in the hands of the town-clerk, and announced his said resignation by advertisement on the 6th of November following, and by the same advertisement offered himself for re-election in pursuance of a requisition signed by a large number of inhabitants of the ward.

On the 9th of November, 1872, the annual meeting of the town council was held, and a letter from the respondent resigning his said office was read. Thereupon it was moved and seconded, that the resignation be accepted. A member of the council thereupon

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called attention to the circumstances of the proceedings by composition above mentioned, and to the provisions of the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 21, and the 5 & 6 Wm. 4, c. 76, ss. 52 and 53, and moved as an amendment,—“That the respondent, one of the members of this council for the ward of East All Saints in this borough, having compounded with his creditors under the Bankruptcy Act, 1869, this council doth hereby declare his said office of councillor to be void; that the mayor and the mover and the seconder of this resolution be and they are hereby requested to sign, and that the town clerk be and he is hereby instructed to countersign, a notice declaring the said office to be void; and that such notice be affixed in some public place within the borough.” This amendment was not seconded; and the notice that the resignation of the respondent be accepted was carried; and the council did not declare the said office void.

On the 18th of November, 1872, an election was held for the office of town-councillor for the ward of East All Saints, to fill the vacancy caused, as was alleged, by the respondent's resignation. The respondent and the other candidates were duly nominated for the said office, and the respondent obtained a majority of 176 votes,—682 votes being given for the respondent, and 546 for the candidate next in order,—and was thereupon declared duly elected by the returning officer.

The petitioners contended that the respondent, under the circumstances hereinbefore stated, was disqualified at the time of the election, by virtue of the provisions of the Municipal Corporations Act, 5 & 6 Wm. 4, c. 76, ss. 52, 53, and of the Debtors Act, 1869, 32 & 33 Vict. c. 62, s. 21. They also contended that the election was irregular and void, in consequence of the council having omitted to declare the office void, in accordance with s. 52 of 5 & 6 Wm. 4, c. 76.

The questions for the opinion of the Court were,—1. Whether at the time of the election the respondent was or was not disqualified for election,—2. Whether the election was or was not irregular and void, in consequence of the town-council having omitted to declare the office void, as above mentioned.

If the Court should be of opinion in the affirmative of either or both of these questions, the respondent was to be declared not to

have been duly elected, and the election was to be declared void. If the Court should be of opinion in the negative upon both questions, the election was to stand confirmed. And it was agreed that the Court should make such order as to costs as in their discretion should seem meet.

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H. James, Q.C. (F. M. White with him), for the petitioners. There are two questions,—first, whether the facts stated in the case shew that the office of councillor was vacated,—secondly, whether, having compounded with his creditors and paid nothing, the respondent was re-eligible to the office. By s. 52 of the Municipal Corporations Act, 5 & 6 Wm. 4, c. 76, coupled with s. 21 of the Debtors Act, 1869, 32 & 33 Vict. c. 62, the respondent, by making a composition with his creditors, ceased to be qualified to act as a town-councillor; and that disqualification could only be got rid of in the way pointed out by the latter part of s. 52, viz. by certificate in case of bankruptcy, or by payment of his debts in full in case of a composition. And there may be good reason for this distinction; for, in the case of bankruptcy, the proceedings are public, but in the case of a composition or a liquidation by arrangement, all is done in secret. The object the legislature had in view was that these offices should be filled by substantial and solvent persons; and that would be defeated if, no part of the composition being paid, the debtor is held to be qualified for re-election.

[BOVILL, C.J. A discharge under s. 48 of the Bankruptcy Act, 1869, would probably be equivalent to a certificate in bankruptcy.]

No doubt. But, in the case of a composition under s. 126, there is no discharge,—nothing that can be said to be equivalent to a certificate in bankruptcy: merely a registration of the resolution. In the event of the instalments not being paid, the rights of action of the creditors would revive: that shews that the resolution for the acceptance of the composition is not “payment.” Then, the election of the 18th of November was clearly a void election. The office of councillor was not absolutely void by the resignation so as to justify a fresh election, until the conditions prescribed by s. 52 of the Municipal Corporations Act had been complied with by a declaration of avoidance by the council and due notice thereof given. If the respondent was disqualified to exercise the office,

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it was not competent to him to resign, or to the council to accept his resignation. A man cannot be said to resign an office which the legislature has declared him to be disqualified to hold. *Reg. v. Chitty* (1) and *Reg. v. Leeds* (2) were referred to.

Herschell, Q.C. (*Grantham* with him), for the respondent. The election in question was good, and the respondent duly elected. The proposition contended for by the petitioners is, that a person who whilst holding the office of town-councillor has compounded with his creditors is for ever thereafter disqualified to hold the office until he has paid his debts in full; whereas a bankrupt who obtains a certificate or a discharge is under no such disqualification, though his estate may have produced nothing to his creditors. Strong language would be required to warrant such a conclusion. The evident object of the Debtors Act, 1869, was, to put arrangements by liquidation and compositions, whether by deed or otherwise, upon the same footing as bankruptcy and certificate or discharge. The acceptance of the composition with security is tantamount to payment. By the operation of the Bankruptcy Act, 1869, the resolution of the meeting of creditors operates as a discharge of the debtor. It is not necessary in all cases that the composition should be actually paid: the acceptance of the securities may by the terms of the agreement or resolution be enough. Having accepted the promissory notes as payment, the creditors could not afterwards sue for their original debts. Anything which is accepted as satisfaction amounts to payment in full within the meaning of s. 52 of the Act. The office was void by the resignation of the respondent. Notwithstanding the disqualification, he still filled the office for the purpose of a valid resignation, though not for the purpose of exercising any of the functions of a councillor: and it was competent to the council to act upon that resignation.

BOVILL, C.J. By s. 21 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), the provisions of the 5 & 6 Wm. 4, c. 76, ss. 52, 53, as to the disqualification of mayors, aldermen, and town-councillors who have been declared bankrupt or have compounded by deed with their creditors, are extended to every arrangement or compo-

(1) 5 Ad. & E. 609.

(2) 7 Ad. & E. 963.

sition by a mayor, &c., with his creditors under the Bankruptcy Act, 1869, whether made by deed or otherwise. That extension of the provisions of the Municipal Corporations Act must, as it seems to me, be taken to apply, so far as it is applicable, to the new state of things created by the Bankruptcy Act, 1869. By that Act provision is made for ordinary bankruptcy, liquidation by arrangement, and composition with creditors. The two former are under the immediate supervision of the Court of Bankruptcy, and are followed by an order of discharge or by something which is equivalent thereto: but there is no provision for an order of discharge in the case of a composition with creditors. By s. 12 of the Debtors Act, 1869, certain penalties are imposed and offences are created with regard to persons who are adjudged bankrupt or have had their affairs liquidated by arrangement; but these do not apply to persons who have compounded with their creditors. How, then, are we to apply the 52nd section of the 5 & 6 Wm. 4, c. 74, to that state of things? That section enacts that, "if any person holding the office of mayor, alderman, or councillor for any borough shall be declared bankrupt, or shall apply to take the benefit of any Act for the relief of insolvent debtors, or shall compound with his creditors, such person shall thereupon immediately become disqualified, and shall cease to hold the office of such mayor, alderman, or councillor as aforesaid; and the council thereupon shall forthwith declare the said office to be void, and shall signify the same by notice in writing under the hands of three or more of them, &c., and the said office shall thereupon become void." It is extremely difficult to see what was the precise intention of the legislature in making this enactment,—whether the office was to become void immediately on the happening of the event contemplated, or upon the happening of that event coupled with the other things mentioned. The proper construction, as it seems to me, is, that, immediately upon the bankruptcy, &c., the person so becoming bankrupt, &c., shall be disqualified and shall cease to do any act as mayor, alderman, or councillor; and that, upon the proper notice being given, the office shall become void for all purposes. If that be the true construction of the section, the office would not become void until the notice was given. No notice was given here, and therefore the office of councillor was not void so as to enable the council

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to proceed to a fresh election. It is contended, however, on the part of the respondent that there was in reality such vacancy created without regard to any notice given to and acted upon by the corporate body, because there was a resignation of the office given to and accepted by them. Now, assuming that there may be a resignation by a corporate officer, provided such resignation was accepted by the corporate body, the question arises whether the respondent was in a position to send in his resignation. The very statement of the proposition, in the view which I take of the Act, seems to answer itself. If he had ceased to hold the office, he would cease to have any power to resign it. After the discharge by composition, it seems to me that the only mode of creating a vacancy would be by the notice provided for by s. 52 of the Municipal Corporations Act. Then, assuming that there was a disqualification, the next question is whether the disqualification has been removed and whether the respondent was entitled to be re-elected. That must depend upon the latter part of s. 52,—“but every person so becoming disqualified and ceasing to hold such office on account of his being declared a bankrupt, or of his applying to take the benefit of any Act for the relief of insolvent debtors, or having compounded with his creditors as aforesaid, shall, on obtaining his certificate or on payment of his debts in full, be capable (if otherwise qualified) of being re-elected to such office.” Here, the respondent has not been declared a bankrupt either within the meaning of this section or within s. 21 of the Debtors Act, 1869; nor is he a person who has taken the benefit of any Act for the relief of insolvent debtors; but he is a person who has compounded with his creditors. Under the Municipal Corporations Act, it must be a composition *by deed*, but the provision in that Act is by s. 21 of the Debtors Act, 1869, extended to “every arrangement or composition with creditors under the Bankruptcy Act, 1869, whether the same is made by deed or otherwise.” This was an arrangement under the Bankruptcy Act, and is by these concluding words of s. 21 of that Act brought within s. 52 of the 5 & 6 Wm. 4, c. 76. Then, has the respondent “obtained his certificate,” or has he “paid his debts in full?” It was urged that, there being no such thing now as a certificate in bankruptcy, anything which is equivalent to a certificate will do. Assume that an order of discharge under

s. 48 of the Bankruptcy Act, 1869, or a special resolution of the creditors under s. 125, subs. 9, would be equivalent to a certificate in bankruptcy, where is there anything equivalent to a certificate in the case of a composition? The resolution in that case is that "a composition shall be accepted in satisfaction of the debts due" to the creditors; and that seems to me to be placed on the same footing as a composition by deed. Then, can it be said that the respondent has paid his debts in full? Sect. 52 of 6 & 7 Wm. 4, c. 76, expressly draws a distinction between composition and payment of debts in full. A composition by deed was binding on the creditors as a resolution is now, and amounted to a discharge of the debtor: and yet the legislature in the Municipal Corporations Act said that there must be payment in full, in order to render the party eligible for election. It seems to me to be a contradiction in terms to say that a man who compounds with his creditors pays his debts in full. I am of opinion that our judgment should be in favour of the appellant.

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KEATING, J. I am entirely of the same opinion. I think the case a very clear one. The 5 & 6 Wm. 4, c. 76, s. 52, provided that if a councillor (among others) should be declared bankrupt, &c., or "compounded *by deed* with his creditors," he should thereupon immediately become disqualified and should cease to hold the office of such councillor. Then it directed that the council should thereupon forthwith declare the office to be void, and signify the same by a certain notice, and it enacted that "the said office shall thereupon become void." Now, a subsequent Act, the 32 & 33 Vict. c. 62, s. 21, has extended the provisions of the former Act to persons who compound *without deed*. In so extending those provisions, s. 21 must have contemplated compositions under the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71. Therefore the respondent, who has compounded with his creditors under s. 126 of that Act, is clearly brought within s. 52 of the Municipal Corporations Act. If so, then he ceases to hold the office of councillor; and, he having so ceased to hold the office, it became the duty of the council under the Act to declare the office void, and to signify that by a notice as provided by the Act, and thereupon "the said office shall become void." The council, however, took a different course; and,

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the respondent having addressed a letter of resignation to the town-clerk, the council accepted such resignation under the impression that they thereby got rid of the provisions of s. 52 of the Municipal Corporations Act as to compositions with creditors. The language is somewhat ambiguous: but I think it is capable of being read as my Lord has read it, viz. that, immediately upon his bankruptcy, &c., the councillor shall cease to exercise the duties of the office, and that the statutory avoidance of the office shall only arise upon the declaration thereof by the council and due publication of the notice. If that be so, and the office was not ipso facto void on the respondent's compounding with his creditors, the election now petitioned against must be void unless the respondent was capable of making a good resignation of his office. It seems to me to be impossible to say that a councillor who has been declared by the statute to be disqualified and to cease to hold his office, is in a position to resign it. It follows, therefore, that the election complained of, which proceeded upon the assumption that there had been a resignation of the office by the respondent, and an acceptance of such resignation by the council, was a void election. Thus, the question whether he was restored to competency or rendered eligible for re-election scarcely arises. But, if it did, I agree with my Lord that the respondent has not brought himself within the provision in the subsequent part of s. 52 of the Municipal Corporations Act, so as to have the effect of a re-qualification. The words are, "every person so becoming disqualified and ceasing to hold such office on account of his being declared a bankrupt, or of his applying to take the benefit of any Act for the relief of insolvent debtors, or having compounded with his creditors as aforesaid, shall, on obtaining his certificate, or on payment of his debts in full, be capable of being re-elected to such office." Now, the respondent here has not obtained a certificate. If he had proceeded by way of liquidation under s. 125 of the Bankruptcy Act, 1862, his discharge under the provisions of that section might fairly have been considered equivalent to a certificate in bankruptcy. But that point does not arise here, because the composition with the creditors was not under s. 125, but under s. 126, the provisions of which are totally different. It is unnecessary to consider what would have been the effect if the composition had been fully paid,

because here at the time of the election none of the instalments had become due. We are not therefore called upon to say that "payment of his debts in full" would have been satisfied by payment or a guarantee of the amount of the composition. In no view, therefore, as it seems to me, can this election be held a good one, and consequently the petitioner is entitled to our judgment.

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HONYMAN, J. I am of the same opinion. It was contended on behalf of the appellant that this election was void upon two grounds,—first, that the respondent was not qualified,—secondly, that the office of councillor was not void at the time the election took place. It may be observed that the provision in s. 28 of the Municipal Corporations Act for the disqualifying of persons for being elected mayor or councillor differs from that in s. 52: still I take it that, when a section says that, in a given event, persons shall be re-eligible, that is tantamount to saying that they shall be disqualified until they comply with the conditions of re-qualification. That being so, s. 52 of the Municipal Corporations Act, as amplified by s. 21 of the Debtors Act, 1869, applies to any kind of composition with creditors, and the respondent is brought within those enactments, because he has made a composition with his creditors under s. 126 of the Bankruptcy Act, 1869, and could only relieve himself from the consequences by obtaining a certificate or by payment of his debts in full. It certainly is difficult to say that a person has ceased to hold the office of town councillor, and yet the office of councillor shall not be void. But that difficulty seems to me to be got over by the observation of my Lord, viz. that an office may be filled by one who has ceased to be qualified to exercise the duties of it. But I think it is quite clear that a man cannot *resign* an office which an Act of Parliament has declared him incapable of filling. The respondent's resignation, therefore, and its acceptance by the council were altogether inoperative. Then the respondent was re-eligible only upon the performance of certain conditions which he has not complied with, viz. a certificate in bankruptcy (or that which is equivalent to it) or payment of his debts in full.

Judgment for the appellants.

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White asked for a certificate under 35 & 36 Vict. c. 40, s. 12. *61*

BOVILL, C.J. That is for the master.

White then asked for an order for the return of the deposit.

BOVILL, C.J. That is for a judge at Chambers.

Agents for appellants: *Hillyer, Fenwick, & Stibbard.*

Agent for respondent: *Rice.*

April 29.

MARSHALL, APPELLANT; SMITH, RESPONDENT.

Public Health Act, 1848 (11 & 12 Vict. c. 63)—Local Government Act, 1858 (21 & 22 Vict. c. 98)—Bye-Laws—Party-Walls—Continuing Offence—Practice on Appeals from Justices.

80 B. D. 603
605-4
Bye-laws were made by the Local Board of Sunderland under the Public Health Act, 1848, s. 115, and the Local Government Act, 1858, s. 34, by one of which (No. 12) all party-walls, except in houses of one storey, were required, under a penalty of 40s., to be 9 inches at least in thickness, and by another of which (No. 42) it was provided that, "in case any offence under any of the foregoing bye-laws shall continue, the person offending shall be liable to a further penalty of not exceeding 40s. for each day during which such offence shall continue after written notice of the offence has been given by the local board to the offender."

The appellant, having been convicted and fined for an offence against bye-law No. 12, in building a party-wall of 4½ inches in thickness instead of 9, was afterwards convicted upon an information charging him under bye-law 42 with *continuing* the offence, and again fined:—

Held, that suffering the party-wall to remain unaltered was not a "continuing offence" within bye-law 42, or, if it was, that the bye-law was unreasonable, —the appropriate remedy being the removal of the structure by the board, as authorized by s. 34 of the Local Government Act, 1858.

Quære whether the party, if liable as a "continuing offender," would remain so liable after he had transferred the premises to a purchaser.

Upon the argument of an appeal from justices, no point can be urged which was not taken before them.

CASE stated by justices pursuant to 20 & 21 Vict. c. 43.

At a petty session at Sunderland, the appellant was charged by an information dated the 29th of October, 1872, "for that he on the 19th of September, 1872 at the township of Bishopwearmouth in the borough of Sunderland, did build a certain party-wall at the west-end of a certain house in Hudson Road less than 9 inches

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thick, as required by the bye-law No. 12 of the said borough, made under the Local Government Act, 1858 (21 & 22 Vict. c. 98), to wit, $4\frac{1}{2}$ inches thick; and for that, although he had been convicted by the justices acting in and for the said borough, and a penalty imposed for the said offence, yet the offence still continued, contrary to bye-law No. 42 of the said borough, and contrary to the statute in such case made and provided;" and the justices adjudged that he should pay a continuing penalty of 5s. per day for seven days previous to the issuing of the summons.

At the hearing it was proved on the part of the informant that certain bye-laws had been made by the corporation of the borough of Sunderland, being the local board of health for the borough, which contained inter alia the provisions following:—

"12. *Structure of walls of new buildings.* The external walls of every new building other than out-offices attached thereto shall be of the following minimum thickness, viz.

"For houses of one storey in height, 12 inches.

"For houses of two storeys in height, the first storey 15 inches, and the second 12 inches.

"For houses of three storeys in height, the first storey 18 inches, the second 15 inches, and the third 12 inches.

"For houses above three storeys in height, the first, second, and third storeys to be the same as houses of three storeys in height, and all subsequent storeys to be 12 inches.

"The external walls of all basements of new buildings to be at least two inches thicker than the walls above such basements.

"All party-walls shall be 9 inches at least in thickness, except in houses of one storey in height; and in houses of one storey in height they shall be $4\frac{1}{2}$ inches in thickness.

"All external walls of out-offices and yard boundary walls shall be 9 inches at least in thickness.

"Any person offending against this bye-law shall be liable for each offence to a penalty of not exceeding 40s."

"42. *Continuing penalties.* In case any offence under any of the foregoing bye-laws shall continue, the person offending shall be liable to a further penalty of not exceeding 40s. for each day during which such offence shall continue after written notice of the offence has been given by the local board to the offender."

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By s. 115 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), it is enacted that all bye-laws made by the local board of health under and for the purposes of this Act shall be in writing under their seal and the signature of any five or more of their number, or (in the case of a corporate district) under the common seal; and the said local board may by any such bye-laws impose upon offenders against the same such reasonable penalties as they shall think fit, not exceeding 5*l.* for each offence, and, in the case of a continuing offence, a further penalty not exceeding 40*s.* for each day after written notice of the offence from the said local board; and the said local board may alter or repeal any such bye-laws by any subsequent bye-laws sealed and signed, or (in case of a corporate district) sealed, as last aforesaid: Provided always that all such bye-laws imposing any penalty shall be so framed as to allow of the recovery of any sum less than the full amount of the penalty: Provided also that no such bye-laws shall be repugnant to the laws of England or to the provisions of this Act, and the same shall not be of any force or effect unless and until the same be submitted to and confirmed by one of Her Majesty's principal secretaries of state, who is hereby empowered to allow or disallow the same, as he may think proper: Provided also that no such bye-laws shall be confirmed unless notice of intention to apply for confirmation of the same shall have been given in one or more of the public newspapers usually circulated within the district to which such bye-laws relate one month at least before the making of such application; and for one month at least before any such application a copy of the proposed bye-laws shall be kept at the office of the local board of health, and be open during office hours thereat to the inspection of the ratepayers of the district to which such bye-laws relate, without fee or reward; and the clerk shall furnish every ratepayer who shall apply for the same with a copy thereof or of any part thereof on payment of 6*d.* for every 100 words contained in such copy.

By the Local Government Act, 1858, s. 34, it is enacted that "the 53rd and 72nd sections of the Public Health Act, 1848, shall be repealed, and in lieu thereof be it enacted as follows:—

"Every local board may make bye-laws with respect to the following matters: that is to say—

"1. With respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof.

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"2. With respect to the structure of walls of new buildings, for securing stability, and the prevention of fires.

"3. With respect to the sufficiency of the space about buildings, to secure a free circulation of air, and with respect to the ventilation of buildings.

"4. With respect to the drainage of buildings, to water-closets, privies, ash-pits, and cess-pools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation.

"And they may further provide for the observance of the same, by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws: Provided always that no such bye-laws affect any building erected before the date of the constitution of the district. But, for the purposes of this Act, the re-erecting of any building pulled down to or below the ground floor, or of any frame-building of which only the framework shall be left down to the ground-floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house, shall be considered the erection of a new building."

By s. 4 of the last-mentioned Act, it is declared that such Act shall be construed together with, and be deemed to form part of the Public Health Act, 1848; that words used in this Act shall be interpreted in the sense assigned to them in the Public Health Act; that bye-laws framed under this Act shall be subject to confirmation, enforced, and dealt with in all other respects as bye-laws under the said Public Health Act; and that the provisions of each of the said Acts shall, as far as may be consistent with the provisions of this Act respectively, be applicable to all matters and things arising under the other Act.

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The appellant built a house in Hudson Road, and the walls thereof were completed in the state in which they now remain, on or before the 28th of April, 1872. The house consists of a basement or cellar, above which there are rooms on the ground-floor, and above the ground floor there is one other storey, forming (as the justices considered) a house of two storeys. The party-wall on the west end of the house was of the thickness of $4\frac{1}{2}$ inches.

For this offence against the bye-law No. 12, the appellant was summoned, and was, on the 19th of September, 1872, adjudged to pay a fine of 20s., which fine was paid, with costs.

On the 16th of October, 1872, the following notice, under the corporate seal, was given to the appellant :—

“ You having been convicted by the justices acting in and for the borough of Sunderland and a penalty imposed for an offence under bye-law 12, made under the Local Government Act, 1858, now in force within the borough, in not building the party-wall of a house in Hudson Road at least 9 inches in thickness, as required by such bye-law, and as the offence still continues, inasmuch as the walls have not been made the required thickness, We, the mayor, &c., of Sunderland, being the local board of health for such borough, hereby give you notice thereof, and require you forthwith to construct such party-walls and build the same 9 inches at least in thickness; and we also give you notice that for each day such offence shall continue, and the walls remain unbuilt the required thickness, you are liable to a penalty not exceeding 40s. for each day during which such offence and omission shall continue; and we further give you notice that it is the intention of us the local board to proceed against you for all further penalties to which you are or may be liable.”

On the part of the appellant it was proved that he had sold the house, and had done nothing thereto since the 28th of April, 1872: and it was contended on his behalf,—1. that, as the wall was proved to be in the same state now as it was in more than six months ago, and as the defendant had not done anything to it in the meantime, the magistrates had under Jervis's Act, 11 & 12 Vict. c. 43, s. 11, no jurisdiction to adjudicate upon this case, notwithstanding that a summons was issued and adjudicated upon on the 19th of September last,—2. that the bye-laws Nos. 12 and 42,

mentioned in the information and summons, were invalid, inasmuch as the Local Government Act, 1858, under the authority of which they purported to have been made, did not authorize the local board to enforce compliance by way of penalty, much less by a continuing penalty; and that, if a penalty could also be inflicted, the defendant might be punished twice for one offence,—3. that the local board could not make two separate bye-laws, with separate and distinct penalties, for one and the same offence, as in the 12th and 42nd bye-laws,—4. that bye-law No. 42 was invalid, because it did not specify any offence, except by referring to other bye-laws, each and all of which specified their own penalties,—5. that the bye-law No. 42 was invalid, because the penalty provided therein was unlimited and unreasonable,—6. that the bye-law No. 42 was invalid, because the penalty imposed was not restricted in its application to such time as the defendant remained owner of the property, and at the time when the offence was alleged to have been committed he had ceased to be owner,—7. that, as the offence, if any, was the original building of the wall, and as nothing whatever had been done by the defendant since that time, no continuing offence within the meaning of bye-law No. 42 had been committed by the defendant, even if such bye-law be valid,—8. that, if any offence had been originally committed by the defendant, it had been purged when he paid the fine which was inflicted under the former summons.

It was contended on the other hand that the local board were expressly authorized by s. 115 of the Public Health Act incorporated in the Local Government Act, 1858, to enforce continuing penalties for continuing offences under bye-laws.

The justices, being of opinion that what had been done by the appellant came within the meaning of bye-law 42, and that such bye-law was valid, and that the appellant was not absolved from liability by having paid the fine under the former conviction, and that the offence, if any, was a continuing offence by the appellant, gave judgment against him.

The question for the opinion of the Court was, whether the justices were correct in point of law in their determination, or as to what should be done in the premises.

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Gully (*Brooks* with him), for the appellant. The conviction is bad: it involves seven distinct offences.

[*Crompton*. That point was not raised before the justices, and therefore cannot be raised now: *Purkis v. Huxtable*. (1)]

KEATING, J. If the objection had been taken, a fresh summons might have been issued.]

The 42nd bye-law is bad, unreasonable, and contrary to law, and not within the authority conferred upon the local board by s. 34 of the Act of 1858. The appellant cannot be a continuing offender after he has ceased to be the owner of the premises; and, whether he can or not, there can be no "continuing offence" in merely leaving the wall as it stands. If the wall be suffered to remain in an improper state, the local board have power under s. 34 of the Act of 1858 to enter and pull it down: and that is the appropriate and the only remedy. If there can be a continuing offender in such a case, it is the present owner of the premises. The appellant, having parted with them, could not now go upon the land to abate the nuisance.

[KEATING, J. It would be difficult to make a man who has purchased the property, probably without knowing that the party-wall was insufficient, an offender against the bye-law.]

It is not necessary to contend for his liability. It is enough to say that the former owner is not liable; otherwise his liability might continue for ever.

Crompton (*G. Abbs* with him), for the respondent. The two questions, whether there can be a continuing offence, and whether the 42nd bye-law is bad, are in substance the same. These bye-laws were made under the combined authority of the Public Health Act, 1848, s. 115, and the Local Government Act, 1858, s. 34; and those enactments clearly warrant the making of a bye-law imposing a penalty for continuing the nuisance, as well as for the original offence. It would obviously be idle to fine a man 40s. for building an insufficient party-wall, if there were no power to fine him for continuing it. The remedy suggested, viz. by pulling down the offending structure, might be inadequate, and might entail expense to the ratepayers. Is a bye-law to be construed to

(1) 1 E. & E. 780; 28 L. J. (M.C.) 221.

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be unreasonable because the offender chooses by his own act to put it out of his power to remove the cause of offence? *Roswell v. Prior* (1) seems to be an authority to shew that both the former and the present owners would be liable, and that at all events the former is. There is nothing in bye-law 42 which is either unreasonable or contrary to law.

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KEATING, J. I am of opinion that this conviction cannot be supported. It appears that the corporation of Sunderland, acting under the Public Health Act, 1848 (11 & 12 Vict. c. 63), and other Acts in connection with it, proceeded to make certain bye-laws. Now, by s. 115 of the Act of 1848 they are authorized to make bye-laws imposing upon offenders against the same such reasonable penalties as they shall think fit, not exceeding 5*l.* for each offence, and, in the case of a continuing offence, a further penalty not exceeding 40*s.* for each day after written notice of the offence from the board. Now, s. 34 of the Local Government Act, 1858, specifies various matters in respect of which the local board may make bye-laws, and amongst them bye-laws "with respect to the structure of walls of new buildings, for securing stability and the prevention of fires,"—a most wholesome provision. In pursuance of these powers, the board proceeded to make certain bye-laws, amongst others one (No. 12) which provided that "all party-walls shall be 9 inches at least in thickness, except in houses of one storey in height." No doubt, the person convicted upon this occasion did build a party-wall of one half of the legal thickness, and thereby exposed himself to the penalty created by that bye-law, and he was accordingly convicted, and properly convicted. Now, s. 115 also enables the board to impose a penalty of 40*s.* a day in case of a continuing offence. That, of course, must mean an offence which is susceptible of continuance; but not an offence like this. That they may enforce continuing penalties in many cases cannot be doubted. Many instances of offences which are susceptible of continuance are given in the Local Government Act, 1858. The offence here was that the appellant built the wall. I was struck by the remark that the whole object of the Act might be defeated, if the justices had not power to inflict penalties *de die*

(1) 12 Mod. 635.

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in diem; because the creator of the nuisance might part with his interest in the premises, and would then be unable to enter and pull down or alter it. On the other hand, to hold him liable to a continuing penalty might work great hardship. The liability could never be got rid of. I should have been disposed to give any reasonable latitude of construction to this bye-law if I saw any real difficulty in otherwise carrying out the Act. But I see no such difficulty; because the same Act authorizes the local board to make bye-laws with reference to pulling down structures which have been improperly erected. That seems to me to be the appropriate remedy for such a case, and not by imposing continuing penalties. I do not say that there might not be a case of continuing offence as to a party-wall. A man might begin to build, and so incur a penalty under bye-law No. 12; and, if he continued to build after notice or after conviction, that might be a continuing offence. I think the appeal should be allowed.

HONYMAN, J. I am of the same opinion. The charge against the appellant was that he on the 19th of September, 1872, built a certain party-wall of a less thickness than required by the bye-law No. 12, made under the Local Government Act, 1858, and that, although he had been convicted of the offence and a penalty had been imposed upon him, "yet the offence still continued, contrary to bye-law No. 42." To entitle the appellant to have the conviction appealed against quashed, it will be enough to say either that the alleged offence is not within the bye-law, or that the bye-law is unreasonable. It is immaterial which. The bye-laws profess to be made with reference to s. 34 of the Act of 1858. Now, the offence under bye-law No. 12 was the building of the wall. The offence alleged to have been committed against the 42nd bye-law is the continuing the wall so improperly constructed. If the provision as to continuing penalties had followed immediately after bye-law No. 12, there might have been some difficulty in construing it. Suppose (after notice) the appellant had gone on for several days building the wall, possibly he might have been liable to several penalties: and that would give sufficient effect to bye-law 42. But, where the offence is completed on one day, the party is not to be fined 40s. for each day on which he omits to destroy

what he has done. The 34th section of the Local Government Act, 1858, gives power to the local board "to remove, alter, or pull down any work begun or done in contravention of such bye-laws." I think the offence charged was not a "continuing offence" within bye-law No. 42; and, if I thought it was, I should have thought it unreasonable.

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Gully asked for costs.

KEATING, J. The general rule is to allow costs to the successful party, unless there are circumstances to induce the Court to order otherwise. I do not see anything in this case to take it out of the ordinary rule.

Conviction quashed, with costs.

Attorneys for appellant: *J. & J. Kyme Wright, for Oliver & Botterell, Sunderland.*

Attorneys for respondent: *Bell, Brodrick, & Gray.*

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 May 9.

Attorney—Agreement with Client as to Costs—33 & 34 Vict. c. 28, ss. 4, 11.

An agreement by an attorney with a client "to charge him nothing if he lost the action, and to take nothing for costs out of any money that might be awarded to him in such action," need not be in writing.

THE plaintiff had brought an action against one Woolley, for injury sustained by him through the negligence of Woolley's carman, in which action he recovered 100*l.* damages. A rule for a new trial was made absolute, on the terms of each party bearing his own costs of such rule. Upon the second trial, the plaintiff again obtained a verdict for 100*l.*, and the damages and taxed costs in the cause were received by the now defendant, the plaintiff's attorney. The latter, claiming to deduct from the 100*l.* damages a sum of 45*l.* for the taxed costs of the rule, handed over the difference to the plaintiff. The plaintiff thereupon brought an action against his attorney to recover the 45*l.* as money received to his use.

The cause was under a judge's order pursuant to the 19 & 20

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Vict. c. 108, s. 26, sent for trial to the Westminster county court (where it was tried with a jury), when the plaintiff swore that the now defendant "agreed with him, as his attorney in *Jennings v. Woolley*, to charge him nothing if he lost the action, and to take nothing for costs out of any money that might be awarded to him in such action." The defendant denied that he had made any such agreement; and it was admitted by the plaintiff that there was no agreement in writing.

The jury having found for the plaintiff, damages 45*l.*,

Campbell Foster, pursuant to leave, moved to enter a verdict for the defendant or a nonsuit. He submitted that an agreement by an attorney to take costs other than the ordinary taxed costs must since the 33 & 34 Vict. c. 28, ss. 4, 11 (1), be in writing.

BOVILL, C.J. There is no ground for a rule in this case. The object of s. 4 was to enable the attorney in certain cases to claim more than he would otherwise be entitled to. For that purpose the agreement must be in writing. Sect. 11 was intended to provide against champerty. But a promise not to charge anything for costs is not champerty.

BRETT, J. I am of the same opinion. The act was not intended to prevent such an agreement as this. The jury thought fit to believe the plaintiff and to disbelieve the defendant.

GROVE and HONYMAN, JJ., concurred.

Rule refused.

Attorney for defendant: *T. Johnson.*

(1) Sect. 4 enacts that "an attorney or solicitor may make an agreement in *writing* with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor," &c., subject to examination and allowance by a taxing master.

And s. 11 enacts that "nothing in this Act contained shall be construed

to give validity to any purchase by an attorney or solicitor of the interest or any part of the interest of his client in any suit, action, or other contentious proceeding to be brought or maintained, or to give validity to any agreement by which an attorney or solicitor retained or employed to prosecute any suit or action stipulates for payment only in the event of success in such suit, action, or proceeding."

WILLIAM WEEKS, EXECUTOR OF WALTER WEEKS, DECEASED, *v.*
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Agent—Company—Director—Warranty of Authority—Misrepresentation of Fact.

The directors of a railway company which had fully exercised the borrowing powers conferred upon it by its special Act, in August, 1864, advertised that they were "prepared to receive proposals for loans on mortgage-debentures," "to replace loans falling due." W. W. (the plaintiff's testator) offered a loan of 500*l.*; and, his offer being accepted, he in the same month sent his cheque for 500*l.* to the directors, for which he requested that a debenture should be issued to him. In pursuance of a resolution of the directors to that effect, the cheque was handed to H., the contractor for the works, who had been (but had then ceased to be) the holder of seven debenture-bonds for 500*l.* each; and H. was requested to transfer one of them to W. W.; and it was by the same resolution directed "that such bond be on the 1st of October exchanged for a new one." H. kept the cheque (which was duly honored), but was unable to transfer the debenture; and in pursuance of a resolution of the directors of the 5th of October, a new debenture-bond for 500*l.* was sealed and sent to the plaintiff, as executor of W. W. The defendant, a director of the company, was a party to each of the above transactions. By a decree of the Court of Chancery of the 14th of February, 1868, the above-mentioned debenture was declared void, as being for a sum in excess of the borrowing powers of the company.

Upon a case stated for the opinion of the Court, without pleadings, and upon the argument of which it was agreed that no question of non-joinder was to be raised:—

Held, that the defendant was liable as for a breach of warranty that the directors had power under the circumstances to issue a debenture which should be valid and binding upon the company; and that the plaintiff was entitled to recover as against him the 500*l.*, together with interest by way of damages.

ACTION to recover 500*l.* and interest from the 1st of April, 1865, the 500*l.* being the amount of a cheque paid by the deceased Walter Weeks for a debenture issued to him under the circumstances hereinafter stated. The cause came on for trial before Bovill, C.J., at the sittings in London after Hilary Term, 1871, when a verdict was by direction of the judge found for the plaintiff for the damages in the declaration, subject to the opinion of the Court upon the following case stated without pleadings:—

1. The plaintiff is the executor of Walter Weeks, who died on September 12th, 1864, having by his will appointed the plaintiff his sole executor. The will was duly proved in the district re-

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gistry by the plaintiff as executor on the 3rd of December, 1864. The defendant was from the year 1860 to 1867 one of the directors of the Carmarthen and Cardigan Railway Company, a company incorporated by an Act of 17 & 18 Vict. c. ccxviii.

2. By that Act (s. 9) the company were authorized to construct and maintain a railway from the South Wales Railway at or near Carmarthen to Newcastle Emlyn, with a view of its being thereafter extended to the town and harbour of Cardigan, and were empowered to raise for that purpose a capital of 300,000*l.* by shares and of 80,000*l.* by bond or mortgage.

3. By an Act of 19 & 20 Vict. c. lxxviii, to enable the company to make a deviation of a portion of their line of railway and to abandon parts thereof, and to grant further powers to the company, and for other purposes, it was by s. 26 enacted as follows:—
“And whereas there will be a saving to the company by the substitution of the works by this Act authorized for the works originally authorized, and the present capital of the company may therefore be reduced: Be it enacted that the capital of the company shall be 200,000*l.* instead of 300,000*l.* as prescribed by the firstly recited Act, and the powers of borrowing given to the company by that Act shall be reduced from 80,000*l.* to 60,000*l.*, and shall be exercisable as soon as the said sum of 200,000*l.* has been subscribed and one half thereof has been paid up.”

4. Early in August, 1864, a resolution was passed by the board of directors of the railway company that the following advertisement should be inserted in the *Times* and other daily newspapers, and the same was accordingly inserted:—

“Loans on mortgage debentures.

“Five per cent. interest. The directors of the Carmarthen and Cardigan Railway Company are prepared to receive proposals for loans on mortgage debentures, for three, five, or seven years, in sums of 100*l.* and upwards, bearing interest at the rate of 5 per cent. per annum, payable half-yearly, to replace loans falling due.”

(Signed by the secretary.)

At the time this advertisement was published, the company had issued debentures to the amount of 60,000*l.*, being the full amount which they were by their Acts of Parliament authorized to issue; and the whole of the said 60,000*l.* worth of debentures were then outstanding against the company. The money proposed to be raised by the loans so advertised for was in-

tended to be applied by the directors in discharge of an equal amount due on the debentures originally issued to raise the 60,000*l*.

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5. On the 10th of August, 1864, Walter Weeks, having seen the advertisement, wrote and sent to the company a letter which was lost, and the contents of which could not be ascertained, except so far as they were to be inferred from the answer thereto, which was as follows:—

“11th August, 1864.

“Sir,—In the absence of our secretary, I beg to accept your offer for loan of 500*l*. on the mortgage debentures of the company, on the terms contained in your letter; and on hearing from you the mortgage will be proposed at the next meeting of the directors. Any information you may require I shall be happy to afford you.

(Signed) Fred. Edwards, accountant.”

6. On the 16th of August, 1864, a meeting of the directors of the company was held; and the following is an extract from their minute-book. The J. L. Propert in the extract mentioned is the defendant in this action; and among the applications there mentioned to have been laid by the secretary on the table was that from Walter Weeks:—

“At a meeting of the directors of the Carmarthen and Cardigan Railway Company held at the offices of the company, No. 4, Chatham Place, Blackfriars, London, on Tuesday, August 16th, 1864,—Present, John Propert, in the chair, J. L. Propert, Samuel Crosse,—the secretary reported that he had inserted advertisements in all the leading London and railway papers for the purpose of obtaining loans on mortgage debentures to replace bonds now falling due; and the secretary laid upon the table the applications he had received in reply to them.”

7. On the day it bears date, Owen Bowen, the secretary of the company, with the authority and by the direction of the directors, wrote and sent to Walter Weeks the following letter:—

“27th August, 1864.

“Sir,—In reply to your application to lend 500*l*. on the debentures of this company, I beg to inform you that your proposal has been accepted; and, when you are prepared with the money, the debenture will be issued to you.”

8. After the receipt of this letter, Walter Weeks, on the 29th of August, 1864, sent by post to the directors of the company his cheque for 500*l*.

9. After the receipt of the cheque, a meeting of the directors of the company was held: and the following is an extract from their minute-book:—

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"At a meeting of the directors of the Carmarthen and Cardigan Railway Company held at the offices of the company, No. 4, Chatham Place, Blackfriars, London, on Tuesday, the 30th of August, 1864,—Present, John Propert, in the chair, Samuel Crosse, J. L. Propert,—the secretary laid upon the table the letters that have been received in answer to the advertisements in the papers, and a cheque for 500*l.* received from Mr. Walter Weeks, for which he requests that a debenture be issued to him.

"Proposed by Mr. Crosse, seconded by Mr. J. L. Propert,—

"Resolved that Mr. Holden be requested to transfer a debenture-bond for 500*l.* to Mr. Walter Weeks in due course, and that the cheque for 500*l.* be paid to Mr. Holden, and that on the 1st of October such bond be exchanged for a new one for the like amount having seven years to run."

The cheque was in pursuance of such resolution paid to Holden and passed by him through his bankers, and was paid by the bankers of Walter Weeks on the 2nd of September, 1864.

10. The Mr. Holden in par. 9 mentioned was the contractor for the making of the railway. Previously to and on the 10th of March, 1863, he held seven original debentures of the company for 500*l.* each, numbered 40, 41, 42, 43, 44, 45, and 46, which had been issued by the company to him. On that day he deposited these debentures and three Lloyd's bonds of the same company for 500*l.* each, with the Royal Naval and Military Assurance Society, as security for 5000*l.* lent to him by that society. These debentures were at or shortly after that time, and before August, 1864, duly transferred by Holden to the said society or their trustees; and at the date of the resolution mentioned in par. 9 the said seven debentures were registered in the names of such transferees. Mr. Holden, in August, 1864, and thenceforward was not the registered holder of any debenture-bond of the company which had been issued by them within the powers conferred on them by their Acts of Parliament. He was, as mentioned in par. 9, requested to transfer a debenture of the company for 500*l.* to Walter Weeks, in order that Weeks might hold the same until a new debenture for 500*l.* was issued by the company and delivered to him. Holden did not, although he retained the cheque and applied the same to his own purposes, transfer a debenture to Walter Weeks, or to the plaintiff, his executor.

11. Between the 30th of August and the 27th of September, 1864, Walter Weeks had written to the directors of the company a letter which is lost and the exact contents of which cannot be

ascertained; and on or about the 27th of September, 1864, the accountant of the company sent him the following answer:—

“September 27th, 1864.

“Sir,—In reply to your letter of the 26th instant, the reason you have not received the debenture is, that we have had no board meeting since; but it shall be forwarded as soon as possible.”

12. On the 5th of October, 1864, a board meeting of the directors of the company was held; and the following is an extract from the minute-book. The J. L. Propert in that extract mentioned is the defendant in this action:—

“At a meeting of the directors of the Carmarthen and Cardigan Railway Company held at the offices of the company No. 4, Chatham Place, Blackfriars, London, on Wednesday, October 5th, 1864,—Present, John Propert, in the chair, J. L. Propert, Samuel Crosse,—

“Proposed by Mr. J. L. Propert, seconded by Mr. Crosse,

“Resolved, that there be now issued and sealed with the company’s seal a debenture-bond in favour of Walter Weeks, such bond bearing date from the 1st of October instant, and payable in seven years.”

13. At the said board meeting the following debenture-bond, sealed with the seal of the company, was in pursuance of the resolution in par. 12 mentioned issued and sent to the address of Walter Weeks. The bond was signed by the defendant as a director, and by Owen Bowen as secretary of the company, and the seal of the company was thereto affixed:—

“Carmarthen and Cardigan Railway Company.

“Mortgage Deed, 500*l*.

“(Loan under the Carmarthen and Cardigan Railway (Deviation) Act, 1856.

“No. 1. Period, seven years.

“By virtue of the Carmarthen and Cardigan Railway (Deviation) Act, 1856,

“We, the Carmarthen and Cardigan Railway Company, in consideration of the sum of 500*l*. paid to us by Walter Weeks, of, &c., do assign unto the said Walter Weeks, his executors, administrators, and assigns, the undertaking of the Carmarthen and Cardigan Railway, and all the tolls and sums of money arising by virtue of the said Act, and all the estate, right, title, and interest of the company in the same, To hold unto the said Walter Weeks, his executors, administrators, and assigns, until the said sum of 500*l*., together with interest for the same at the rate of 5*l*. for every 100*l*. by the year, be satisfied. The principal sum to be repaid on the 1st day of October, 1871.

“Given under our common seal this 5th day of October, 1864.”

There were annexed to the said debenture-bond coupons in the usual form for the half-yearly payments of interest thereon at 5*l*. per cent. per annum.

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14. The said debenture-bond was received at the address of Walter Weeks by the plaintiff, his executor, who by letter informed the secretary of the company of the death of Walter Weeks; and on or about the 15th of October, 1864, the plaintiff wrote a letter to the secretary of the company, and received in reply thereto the following letter inclosing the cheque therein mentioned:—

“Carmarthen and Cardigan Railway Company,

“No. 4, Chatham Place, Blackfriars,

“London, 17th October, 1864.

“Sir,—I am in receipt of your letter of the 16th instant, and in accordance with your request now forward you cheque 2*l.* 3*s.* 10*d.*, being the interest from 29th August to 30th September on 500*l.*, the receipt of which please acknowledge in due course.

“Owen Bowen.”

15. Neither Walter Weeks in his life-time nor the plaintiff after his decease had any notice or knowledge in fact of any of the circumstances attending the issue or origin of the said debenture-bond, other than as hereby expressly appears. The plaintiff in due course presented and received the amount of the first coupon for the half-year's interest on the said debenture due April 1st, 1865. But, on the subsequent coupon being presented for payment in October of that year, it was not paid; and the plaintiff, in reply to an application by him for such payment, received from the then secretary of the company a letter of which the following is a copy:—

“Carmarthen and Cardigan Railway Company,

“No. 4, Chatham Place, Blackfriars,

“London, 16th October, 1865.”

“Sir,—In reply to yours of the 13th instant regarding the non-payment of debenture coupon, I beg to say that the company has at present no funds, and the line is in the possession of the Court of Chancery. The present directors are making an investigation into the affairs of the company; and until such is finished I cannot say what course will be pursued. In the meantime I beg the favour of your refraining from legal proceedings, as nothing can be gained by resorting to such.

“Frederick Edwards, Secretary.”

16. A suit was instituted against the company in October, 1864, by one Fountaine, by the decree in which, dated the 14th of February, 1868, the above-mentioned debenture of the 5th of October, 1864, was declared void, as being for a sum in excess of the borrowing powers of the company, which had at the time when

the same was issued been fully exercised: see *Fountaine v. Car-marthen Ry. Co.* (1)

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The question for the opinion of the Court was whether the plaintiff was, as executor of Walter Weeks, entitled to recover against the defendant the said sum of 500*l.* and interest thereon, or either of the said sums. No question of non-joinder was to be raised.

Kingdon, Q.C. (*Philbrick* with him), for the plaintiff. The power of the company to borrow money on debentures was by the last special Act limited to 60,000*l.*, and that limit had already been reached at the time the transaction in question took place; and it was upon that ground that the debenture was held void by Page Wood, V.C., in *Fountaine's Case*. (1) The 500*l.* obtained from Walter Weeks by the defendant, as a director of the company, having been so obtained upon the faith of a representation by him that the company had power under the Act to issue a valid debenture, when he must or ought to have known that they had no such power, the plaintiff is entitled to recover it back, upon the principle laid down in that class of cases of which *Richardson v. Williamson* (2) is the latest.

Manisty, Q.C. (*R. E. Turner* with him), for the defendant. Under the circumstances stated in this case, the defendant has incurred no personal liability; or, at all events, the plaintiff can only be entitled to nominal damages. The defendant has been guilty of no fraud, nor of any misrepresentation of fact. The debenture being a nullity, the plaintiff is in no worse position than he would have been in if no debenture at all had been given to him; in which case he would have had his remedy against the company, either by an action for money had and received, or by a special action or a bill in equity. If he had received a valid debenture, it is clear that he would only have had the security of the company. The defendant never could have been personally liable. The company had power to borrow money for the purpose of paying off the 60,000*l.* debenture stock; and the directors bonâ fide intended to exercise that power. The case of *Richardson v. Williamson* (2) bears no resemblance to this case. There, the

(1) Law Rep. 5 Eq. 316.

(2) Law Rep. 6 Q. B. 276.

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directors had no power to borrow money at all, not having made a rule to authorize them to do so. Here, the directors had a right to borrow money for the purpose of paying off the old debentures; and Weeks knew the purpose for which the money was wanted.

[HONYMAN, J. The consent of a general meeting would be necessary to a re-borrowing for the purpose of paying off former debentures; 8 & 9 Vict. c. 16, s. 39. Does not the defendant here impliedly warrant that the debenture which he purported to issue was being issued under the powers of the special Act? The advertisement holds out the inducement of a debenture which will be binding on the company.]

By s. 100 of the general Act the directors are relieved from personal liability for anything *bonâ fide* done by them on behalf of the company. The plaintiff's only remedy is against the company: *Beattie v. Lord Ebury*. (1)

[KEATING, J. If they had got a 500*l.* debenture from Holden, the directors might, no doubt, have lawfully issued a fresh debenture for that amount and handed it to Weeks.]

The 30 & 31 Vict. c. 127, s. 26 (Railway Companies Act, 1867) enacts that "money borrowed by a company for the purpose of paying off, and duly applied in paying off, bonds or mortgages of the company given or made under the statutory powers of the company, shall, so far as the same is so applied, be deemed money borrowed within and not in excess of such statutory powers."

[HONYMAN, J. If your argument be correct that enactment was quite unnecessary.

Kingdon, Q.C. The 30 & 31 Vict. c. 127 passed three years after the transaction in question.]

The mischief to be provided against was the company's having a permanent borrowed capital exceeding the statutory limit.

Kingdon, Q.C., in reply. The argument that Weeks would have a right to sue the company either for money had and received, or by special action, or by bill in equity, is altogether a fallacy. The company having exhausted their borrowing powers, but wishing to have them re-created by a re-issue of their debentures, the course they took was this,—the directors assumed the responsi-

(1) Law Rep. 7 Ch. 777.

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bility of doing that which as a company they had no right to do. They,—the directors, not the company,—advertise for loans upon debenture. The company was not in a situation to issue debentures. The proper course would have been to have waited until the outstanding debentures fell due, and then to have bought up the old ones and issued new. What they did was no compliance with the bargain between the directors and Weeks. They had no power to bind the company by any such transaction. Even under 30 & 31 Vict. c. 127, the money must be borrowed for the purpose specified, and duly applied to that purpose. The defendant has clearly been guilty of a breach of his warranty.

KEATING, J. The question is whether the plaintiff can recover from the directors personally (for, the argument is the same as if all the directors were sued) the 500*l.* paid by Walter Weeks in his life-time under the advertisement issued by the directors in August, 1864. That advertisement was headed “Loans on mortgage debentures;” and then it goes on,—“The directors of the Carmarthen and Cardigan Railway Company are prepared to receive proposals for loans on mortgage debentures for three, five, or seven years, in sums of 100*l.* and upwards, bearing interest at the rate of 5 per cent. per annum, payable half-yearly, to replace loans falling due.” The advertisement is not addressed to directors of companies, but to all the world; and there is no reason to suppose that Weeks would have assumed that he was lending his money to a company which had exhausted its borrowing powers. He writes to offer a loan of 500*l.* upon the footing of that advertisement. He is told that his offer is accepted. On the 27th of August he receives a letter in these words, signed by the secretary,—“In reply to your application to lend 500*l.* on the debentures of this company, I beg to inform you that your proposal has been accepted; and, when you are prepared with the money, the debenture will be issued to you.” That letter was written in pursuance of a resolution of the directors (one of whom was the defendant) of the 16th of August; and it appears to me to be a statement made by the authority of the directors and each of them to the lender that, if he will lend them 500*l.*, they will issue to him a binding debenture of the company

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for that sum, and amounts to a warranty that they the directors had power to do so. At that time it is clear that they had no such authority. They expected to have power to do so at a future time; but they had none at the time: and the money was advanced upon the faith of their assertion that they had it then. They had no authority whatever from the company to act as they did. Having given that assurance, and having received the cheque for 500*l.* from Walter Weeks, the present defendant sent the cheque to a person named Holden, who was the contractor for making the railway, and who formerly was the holder of seven debentures of the company for 500*l.* each, but which he had parted with more than twelve months before to an insurance company, the transfer having been registered in the books of the defendant's company. The cheque having been sent to Holden with a direction to him to send a debenture to Weeks, Holden, not having a debenture to send, puts the money in his pocket. In October, 1864, a debenture for 500*l.*, signed by the defendant as director, pursuant to a resolution passed at a meeting of the 5th of that month, was sent to Walter Weeks' address, and was received by the plaintiff, his executor. So far as binding the company is concerned, that document was mere waste-paper. The directors had no power to issue it, and it was afterwards held by the Court of Chancery to be absolutely and ab initio void. (1) The question now is, whether the plaintiff can make the directors responsible personally on their warranty that they had the authority which they did not in fact possess. Mr. Manisty has argued that, assuming the debenture to be void ab initio, the money has been received by the company and they are liable for it, and therefore the plaintiff has sustained no damage. The liability of the company will depend upon whether or not the directors had the authority of the company to do what they have done. It appears to me that they had no such authority. They might have considered, when they issued the advertisement, which was before the passing of the 30 & 31 Vict. c. 127, that they were authorized to borrow money for the purpose of paying off bonds falling due. But they held themselves out as competent to take up this money from Weeks upon the security of a debenture, when they had no such authority. Their warranty consequently is broken,

(1) *Fountainne v. Carmarthen Ry. Co.*, Law Rep. 5 Eq. 316.

and they are personally liable; and the plaintiff is entitled to recover.

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HONYMAN, J. I am of the same opinion. I entertain no doubt whatever that the defendant, who assumed to issue the debenture in question as a valid and binding security, was guilty of a breach of warranty. Some cases have been referred to. Willes, J., delivering the judgment of the Court of Exchequer Chamber in *Collen v. Wright* (1), says: "I am of opinion that a person who induces another to contract with him as the agent of a third party, by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. This is not the case of a bare misstatement by a person not bound by any duty to give information. The fact that the professed agent honestly thinks he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist." That is followed by *Richardson v. Williamson* (3); and I do not think that that rule is at all interfered with by *Beattie v. Lord Ebury*. (4) No doubt, expressions are to be found in the judgment of Lord Justice Mellish in that case which might at first sight induce one to suppose that he considers the rule to be applicable only where there is actual misrepresentation. But, when looked at more closely, it will be found that what he means to say is, that, if the representation is not a representation of fact, but of law, the rule as to warranty does not apply. It is not necessary that the want of authority should even be known to the supposed agent. What he means is this,—if one says, "I am authorized by warrant of attorney to act for A. B.; and here it

(1) 8 E. & B. 647, at p. 657; 27 L. J. (Q.B.) 215. (2) Law Rep. 6 Q. B. 276. (3) Law Rep. 7 Ch. 777.

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is ;” and it should turn out that the instrument contains no such authority ; in that case the rule does not apply. Referring to *Collen v. Wright* (1), he says,—“There, it is perfectly plain that the defendant had made a misrepresentation in point of fact.” He then refers to *Richardson v. Williamson* (2), upon which he observes,—“There, the plaintiff lent 70*l.* to a building society, and received a receipt signed by the defendants as two of the directors certifying that the money had been lent ; and then it turned out that in point of law they had no power to borrow money. But then, their power to borrow money depended upon whether they had made a rule to borrow money, because a benefit building society may receive money, at any rate to a certain amount, on deposit, if it has a rule enabling it so to receive money. Therefore that was taken as a representation by the directors that they had such a rule, and that the borrowing was within the rule, when in point of fact there was no such rule at all.” He then refers to *Cherry v. Colonial Bank of Australasia* (3), and goes on (4) : “Now, although I have found no case at law, there is a case in equity which clearly shews that the rule in this Court is that a person cannot be made liable for making a misrepresentation unless it is a misrepresentation in point of fact, and not merely in point of law. I think anybody would be startled if it was said that if you asked somebody what was the law upon a particular point, and he gave you his opinion as to what the law was, and you acted upon it and altered your position, a bill could be maintained against him to make good the representation, if his opinion turned out to be wrong. The case I refer to is *Rashdall v. Ford*.” (5) After reading the head-note of that case, he proceeds : “Now, in that case, as far as regards there being a representation that they had power to bind the company, there was as direct a representation as could possibly be conceived. The plaintiff offered to lend money to the company, and the company said, We will give you a Lloyd’s bond as security, and they gave him a Lloyd’s bond as security. According to the authorities, that was a representation that they had

(1) 7 E. & B. 701 ; 26 L. J. (Q.B.)
 147 ; in error, 8 E. & B. 647 ; 27 L. J.
 (Q.B.) 215.

(2) Law Rep. 6 Q. B. 276.

(3) Law Rep. 3 P. C. 24.

(4) Law Rep. 7 Ch. at p. 802.

(5) Law Rep. 2 Eq. 750.

power to bind the company by a Lloyd's bond, but because as a matter of law a Lloyd's bond is not a good instrument binding upon the company when it is given for money borrowed, and as it was as much the business of the plaintiff as of the directors to know what the law was, it was held that no suit could be maintained." Taking the whole of that together, it amounts to this, that a misrepresentation as to a matter of law, which every man is supposed to know, gives no cause of action. In that I fully agree. Here, however, the defendant, knowing that the power of borrowing money upon debentures had been fully exercised by this company,—a fact which was unknown to the person with whom he was dealing,—represented that the directors had power to issue debentures so as to bind the company. I think, therefore, that the defendant was guilty of a breach of warranty. But it was insisted that the plaintiff could only be entitled to nominal damages, because, if the company were insolvent, the debenture would be valueless, and Mr. Weeks would sustain no damage from not getting it; and, if solvent, he would have his remedy against them. If Mr. Manisty could have made out his last proposition, I should have thought that might be so. But I think it lay upon the defendant, who says that the plaintiff has a remedy against the company, to satisfy us that the fact is so; and he has failed to satisfy me that either Walter Weeks or his executor could have had any remedy against the company for the sum advanced. The authority given to the company by s. 9 of their Act of incorporation, 17 & 18 Vict. c. ccxviii, was, to raise a capital of 300,000*l.*, and to borrow 80,000*l.* more on bond or mortgage. By the subsequent Act of 19 & 20 Vict. c. lxxviii, the capital was reduced to 200,000*l.*, and the borrowing power to 60,000*l.*, and that power had been exercised to its full extent. Mr. Manisty was driven to contend that, admitting that they could not borrow more money on debentures, they were still at liberty to receive money on deposit upon the terms that they should pay off some of the outstanding debentures and then issue new ones. By s. 38 of the general Act (8 & 9 Vict. c. 16), the company, if authorized by their special Act to borrow money on mortgage or bond, may borrow "such sums of money as shall from time to time by an order of a general meeting of the company be authorized to

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be borrowed, not exceeding in the whole the sum prescribed by the special Act." But such power cannot be exercised unless the money so borrowed is borrowed upon the security of a mortgage bond. Sect. 39 provides that, "if, after having borrowed any part of the money so authorized to be borrowed on mortgage or bond, the company pay off the same, it shall be lawful for them again to borrow the amount so paid off, and so from time to time; but such power of reborrowing shall not be exercised without the authority of a general meeting of the company, unless the money be so reborrowed in order to pay off an existing mortgage or bond." That at first sight would seem to give some sanction to Mr. Manisty's argument; but its words may be satisfied by a case where, having borrowed part of the sum authorized, the company are desirous of paying it off; and it certainly gives no sanction to their exceeding the limits of their borrowing powers. The 30 & 31 Vict. c. 127, s. 26, seems to confirm the view I take. It enacts that "money borrowed by a company for the purpose of paying off, and duly applied in paying off, bonds or mortgages of the company given or made under the statutory powers of the company, shall, so far as the same is so applied, be deemed money borrowed within and not in excess of such statutory powers." That Act passed about three years after the transaction now in question; and therefore it is only useful as shewing the intention of the legislature. I read it as a statutory declaration that if the money is not so applied it is an offence against both the letter and the spirit of the Act. Mr. Manisty has failed to satisfy my mind that the company are liable for this money, or to shew any ground upon which the damages should be cut down. I therefore think the plaintiff is entitled to recover the 500*l.* and interest.

KEATING, J. If it is in our discretion, I think this is a case in which the plaintiff is entitled to recover interest by way of damages.

Judgment for the plaintiff.

Attorneys for plaintiff: *R. W. Childs & Batten, for Little, Woolcombe, & Venning, Devonport.*

Attorney for defendant: *F. C. V. Pike.*

THE VESTRY OF BERMONDSEY, APPELLANTS; JOHNSON, RESPONDENT.

1873

May 6.

Metropolis Local Management Amendment Act, 1862 (25 & 26 Vict. c. 102)—

General Line of Building, under s. 75—Limitation of Time for Summons for a Penalty or Forfeiture, under s. 107.

By s. 75 of the Metropolis Local Management Amendment Act, 1862, the erection, without the consent of the Metropolitan Board of Works, of any building, &c., in any street, &c., beyond the general line of buildings is prohibited, and it is enacted that for any infringement of that provision the vestry or board may summon the offender before a justice, who may order the demolition of the building and make an order for costs; and that, on default by the owner, the vestry or board may enter and demolish it. And s. 107 enacts that "no person shall be liable for the payment of any *penalty* or forfeiture under the recited Acts or that Act, for any offence made cognizable before a justice, unless the complaint respecting such offence have been made before such justice within *six months* next after the commission or discovery of such offence :"—

Held, that this limitation clause applies only to the case of pecuniary penalties or forfeitures, and not to offences under s. 75.

CASE stated by a police-magistrate under 20 & 21 Vict. c. 43.

A summons was taken out under the Metropolis Management Amendment Act, 25 & 26 Vict. c. 102, s. 75, charging that Robert Johnson, the respondent, did, in the parish of Bermondsey, unlawfully erect a certain building beyond the general line of buildings in a street called Market Place, in the parish, without the consent in writing of the Metropolitan Board of Works. The summons was dated the 29th of August, 1872, but it alleged no specific date as the time of commission of the alleged offence.

It was proved that the building in question was erected in January, 1871; and there was no evidence of its coming formally to the knowledge of the vestry till towards the end of December in that year.

In January, 1872, the vestry applied to the superintending architect to the Metropolitan District Board of Works to decide the general line of buildings, but did not obtain his decision till the 6th of June, 1872.

The magistrate was of opinion that the general line so decided by the superintending architect was the general line of buildings in the street in question, and that the building erected by the de-

See D. 19.

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fendant (the respondent) was a building within the meaning of the Act, and had been erected beyond such general line.

But it was contended on behalf of the defendant that, the building having been erected so far back as January, 1871, and having been "discovered" if not before, at least as far back as December in the same year, more than the six months had elapsed within which complaint respecting such offence must be made under s. 107 of the same Act in order to make offending parties liable to a penalty or forfeiture by order of a justice.

It was, on the other hand, contended on behalf of the vestry that the offence was not completed until the general line of buildings had been established by the decision of the superintending architect, that the complaint was therefore made in time, and that there ought to be a conviction.

The magistrate,—being much guided by the case of *Brutton v. St. George, Hanover Square* (1),—decided that lapse of time had taken away the right of vestry or of the justice to demolish or interfere with the building forming the subject of complaint; and he accordingly dismissed the summons.

The question reserved for the opinion of the Court was, whether, having regard to all the circumstances of the case, the magistrate's decision was right in point of law, or whether he had jurisdiction to hear and determine the case on its merits.

Wills, Q.C. (*Nathan* with him), for the appellants. The first question is whether the limitation clause, s. 107, of the 25 & 26 Vict. c. 102, applies at all to a case of this sort. The summons was taken out under s. 75, which enacts that "no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, &c., such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being." For any infringement of that provision the vestry or local board may summon the offender before a magistrate, who may order "the demolition of any such building or erection," and may make an order for costs; and on default the vestry or board may enter and demolish the offending structure,

and may recover the costs thereby incurred "either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board, in manner provided by s. 227 of 18 & 19 Vict. c. 120, as to the recovery of penalties,"—that is, in the manner provided by 11 & 12 Vict. c. 43. The limitation clause which is suggested to apply to this case is s. 107 of the 25 & 26 Vict. c. 102, which enacts that "the 233rd section of the 18 & 19 Vict. c. 120 (which limited the time for proceeding to three months) is hereby repealed; and in lieu thereof it is hereby enacted that no person shall be liable for the *payment* of any *penalty* or *forfeiture* under the recited Acts or this Act, or any bye-law made by virtue thereof, for any offence made cognizable before a justice, unless the complaint respecting such offence have been made before such justice within *six* months next after the commission or discovery of such offence." "Penalty or forfeiture" there evidently means a pecuniary penalty,—something which can be paid. That this is the meaning is clear from s. 105, which directs that all penalties or forfeitures shall go and be paid "one half to the informer, and the remainder to the vestry or district board." In *Brutton v. St. George, Hanover Square* (1), it was held that the six months limited by s. 107 for the commencement of any proceedings for penalties under the Act begins to run from the time when the structure is discovered to be so far advanced as to shew the full extent of the projection complained of, and not from the completion of the building. The circumstances of that case, however, are very unlike those of the present, though it is true Malins, V.C., seems to treat the thing as an offence. But it was not necessary to the decision of the matter then before him to decide this point. It may be that the *costs* may not be recoverable: see s. 104.

[HONYMAN, J. Your summons asks for the demolition of the building, and costs.]

"According to law." If the law be that the board are disentitled to costs, the only consequence will be that they will lose them. The magistrate may in his discretion disallow the costs, by reason of the delay in complaining.

Then, assuming that the limitation clause does apply, the respondent was not guilty of any offence until the superintending

(1) Law Rep. 13 Eq. 339.

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architect to the metropolitan board had fixed the "general line of building;" and that was not done here until the 6th of June, 1872. The summons, therefore, was in time.

[HONYMAN, J. If the limitation clause does not apply, there will be no limitation at all. The vestry might take action at any remote period.]

In a case of oppression such as that, the Court of Chancery would restrain the proceedings. The Act was intended to give to vestries and local boards very large and almost despotic powers for the preservation of uniformity and the general good of the district. Before the passing of the 25 & 26 Vict. c. 102, there was no limitation: s. 143 of the 18 & 19 Vict. c. 120 enacted that, "in case any building be erected contrary to this enactment [that is, beyond the regular line of building], it shall be lawful for the vestry or district board in whose parish or district such building is situate to cause the same to be demolished or set back (as the case may require), and to recover the expenses incurred by them from the owner of the premises, in manner provided by this Act."

The respondent did not appear.

KEATING, J. I have come to the conclusion, though with great reluctance, that the limitation clause (s. 107) of the 25 & 26 Vict. c. 102, which imposes a limitation of six months "next after the commission or discovery of such offence" for a proceeding before a justice "for the payment of any penalty or forfeiture" under the Act or the bye-laws, "for any offence made cognizable before such justice," does not apply to the present case. I say I have arrived at that conclusion with great reluctance, because I cannot help seeing that it may be productive of a great amount of oppression, if the vestry or the local board may delay taking proceedings for an indefinite time. But the simple answer is that the legislature has so willed it; and we have nothing to do but to direct the application of the rule which they have thought fit to lay down. The proceeding before the justice is more in the nature of a preliminary proceeding. Whereas the former statute (18 & 19 Vict. c. 120) gave power to the vestry or the local board to pull down any building erected without consent beyond the regular line of

building, without any limitation of time, the legislature seems to have thought that hard, and therefore by s. 75 of the 25 & 26 Vict. c. 102, requires the vestry or board first to make complaint before a justice, who shall summon the party, and then, upon proof that an offence against the Act has been committed, shall make an order upon him to demolish the building, or so much thereof as is "beyond the general line so fixed as aforesaid," within a time to be fixed, and shall make an order for costs; and, in default of the erection complained of being demolished within the prescribed time, the vestry or board may enter and demolish it themselves, and may recover the expenses by them incurred in so doing in a way pointed out. In this case a summons was taken out upon a complaint by the vestry that the respondent had, without the consent in writing of the Metropolitan Board of Works, unlawfully erected a certain penthouse or shed, "being a building, structure, or erection beyond the general line of building" in the street, "contrary to the provisions of the Metropolis Management Act, 1855, and the Metropolis Management Amendment Act, 1862." When the case came before the magistrate, he was at first inclined to think that the limitation clause did not apply to this case: but, upon being pressed with the case of *Brutton v. St. George, Hanover Square* (1), he decided that this was a case in which it was sought to make the defendant "liable for the payment of a penalty or forfeiture," under the Act, within s. 107. I am, however, unable to see that this is a proceeding for a "penalty or forfeiture" within that section. I think the magistrate very properly deferred to the opinion of Malins, V.C., and dismissed the summons. But now that the matter has come before us, with every disposition to give due weight to an opinion expressed by a judge of the Court of Chancery, I am unable to give my assent to the view of the Vice-Chancellor in that case. There, the vestry had proceeded against the builder, and not against the owner, and the summons was not issued until after the work was completed, and more than six months after the structure had been discovered to be so far advanced as to shew the full extent of the projection complained of. Vice-Chancellor Malins decided against the vestry. But I find that, although it was brought to his notice that s. 107 did not apply to the case, he did

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not in his judgment take any notice of that argument. Having decided the real point in the case, he does go on to the other question in a way which shews that he assumed s. 107 to be applicable. In differing from that impression, therefore, we cannot be said to overrule a decision by which we might otherwise have felt ourselves bound. It seems to me that this case cannot be brought within the words of s. 107, though I may say I should have been by no means dissatisfied if I could have come to the conclusion that it did. The case must therefore go back to the magistrate in order that the summons may be heard on its merits. I much regret that we have not had the advantage of hearing what could have been urged by counsel on behalf of the respondent.

HONYMAN, J. I agree in the result to which my Brother Keating has come, and I also share with him the reluctance with which I arrive at it. It may be the means of working considerable injustice; and it is much to be regretted that Mr. Johnson did not instruct counsel. The ground of my decision is that the power given to the vestry by s. 143 of the 18 & 19 Vict. c. 120, to demolish any building erected beyond the general line of buildings in any street, &c., clearly was not a penalty or forfeiture within s. 223 of that Act; and that s. 107 of the 25 & 26 Vict. c. 102 must receive the same construction as s. 143 of the former Act, and be equally applied to pecuniary penalties only. I also agree with my Brother Keating that, if we had found a deliberate expression of opinion by Vice-Chancellor Malins on the subject, we ought to have hesitated long before we came to a contrary conclusion. The case must go back to the magistrate. With regard to whether or not the vestry would be entitled to costs, I decline to express any opinion.

Case remitted.

Attorney for appellants: *B. G. Wilkinson.*

TUTILL v. THE WEST HAM LOCAL BOARD OF HEALTH.

1873

May 1.

*West Ham Local Board of Health Act, 1867 (30 Vict. c. lvi.), s. 15—Open
Ditches at Roadside.*

By s. 15 of a local Act, the local board were directed to cause offensive ditches to be cleansed, covered, or filled up; and s. 16 impowered them to "cause the ditches at the sides of or across public roads and byeways and public footways to be filled up, and to substitute pipe or other drains alongside or across such roads," &c.; and enacted that "the surface of land gained by filling up such ditches might, if the local board so thought fit and directed, be thrown into such roads and ways and be repairable as part thereof, and be under the control of the local board."

Adjoining a highway within the district was a strip of land 9 feet in width next to the plaintiff's inclosed land, and separated from the highway by a line of posts and rails. This strip of land comprised 1 foot of greensward on the outer edge (in which the posts were fixed), a five-foot ditch, and 3 feet of greensward next to the plaintiff's inclosed land. A similar strip extended along the front of the adjoining property, with similar posts and rails, but no ditch. The posts and rails were put up about forty years ago, and had been usually repaired by the plaintiff and the former owners of his property, but on two or three occasions the surveyor of the highways and the local board had repaired them, without, however, the plaintiff's knowledge. The board removed the posts and rails and covered the ditch.

Upon a special case, reserving power to the Court to draw such inferences as a jury might have drawn:—

Held, that s. 16 of the local Act did not justify the board in doing as they did.

ACTION to recover damages for an alleged trespass. The following case was under a judge's order stated by an arbitrator, without pleadings, for the opinion of the Court:—

1. Before and at the time of the alleged trespass hereinafter mentioned, the plaintiff was possessed of a close of land in the district of West Ham, in the county of Essex. The close was and is bounded on the west by a public road called Upton Lane in the said district.

2. The land of the plaintiff before and at the time of the alleged trespass was and still is inclosed by a close fence eight feet in height. Outside this fencing, and between it and the metalled roadway of Upton Lane, was a strip of land averaging nine feet in width, and separated from the roadway by wooden posts about two feet in height, with rails along the top (as shewn in the plan)

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where the strip extends in length from B. to B. (1) In this strip of land was a ditch of the average width of five feet. Three feet in width of the strip was occupied by the bank of the ditch which was on the east side of the ditch next to the high fence, and was covered with grass; and the remaining one foot of the strip was on the west side of the ditch next to the posts and rails, and was likewise covered with grass. The said posts and rails abutted on the roadway. The ditch was the only means of draining Upton Lane, there being no ditch on the other side. Before and at the time of the alleged trespass there were remains or stumps of two old posts at A. and A. on the plan; and the plaintiff claimed and still claims the whole strip of land within A. A. and B. B., including the ditch and posts and rails. The strip of land is open to the roadway except as divided by the posts and rails.

3. The ditch, bank, posts, and rails had existed as above described for forty years; and during that time the plaintiff and his predecessors in title had been in possession of the close of land, and had from time to time repaired the posts and rails. They had also been repaired during the said period two or three times by the surveyor of highways for the district, and once, twelve years since, by the defendants; but there was no evidence to shew that the plaintiff or his predecessors in title knew of the repairs having been done either by the surveyor of highways or by the defendants.

4. Before and at the time of the alleged trespass there were and still are standing from the southern point B. to C. on the plan wooden posts, about 3 feet 6 inches in height, with an iron railing from one to the other, fronting the land of an adjoining owner.

5. The defendants are the local board of health for the district of West Ham mentioned in the Act of Parliament 30 Vict. c. lvi.; and by s. 16 of that Act it is enacted that "the local board, when

(1) It appeared from the plan annexed to the case that there was no footway on the side of the road on which the ditch was. The space between the letters B. B. embraced the whole frontage of the plaintiff's land. From B. to C. was a similar strip of land fronting the estate of the adjoining

owner, where no ditch existed, but where the posts and rails remained. The space between A. and A. on the plan (which was without posts and rails, though there were indications of posts having been there) seemed to have been thrown into the highway.

they think fit, may cause the ditches at the sides of or across public roads and byeways and public footpaths to be filled up, and to substitute pipe or other drains alongside or across such roads and ways, with appropriate shoots and means of conveying water from such roads and ways thereunto, and from time to time to repair and amend the same; and the surface of land gained by filling up such ditches may, if the local board so think fit and direct, be thrown into such roads and ways and be repairable as part thereof, and be under the control of the local board."

6. The defendants, intending to act under the provisions of that Act, on or about the 1st of February, 1869, caused the ditch to be filled up and the wooden posts and rails to be removed, and directed that the surface of the land gained by filling up the ditch should be thrown into Upton Lane. Before filling up the ditch they caused to be laid down 9-inch drain-pipes in the bed of the ditch from the point D. to join a then-existing brick drain at or near the northern point B. These pipes also communicated with other drain-pipes laid across the road from D.

7. Afterwards, the plaintiff caused to be erected other posts and rails on the site of those which had been removed: but the defendants, on or about the 14th of May, 1869, caused these posts and rails also to be removed.

The question for the opinion of the Court was, whether the defendants were justified in causing the ditch to be filled up and the posts and rails to be removed.

If the Court should be of opinion in the affirmative, judgment was to be entered for the defendants, with costs. If the Court should be of opinion in the negative, judgment was to be entered for the plaintiff for 5*l.* as damages, with costs.

The Court was to be at liberty to draw any inferences of fact which a jury ought to have drawn or found, and was also to have the power of granting all usual certificates,

Day, Q.C. (*Lanyon* with him), for the plaintiff. The question arises upon s. 16 of the Local Board of Health Act for West Ham (30 Vict. c. lvi.), set out in the case, which authorizes the local board to cause the ditches "at the sides of or across public roads and bye-ways and public footpaths" to be filled up, and to sub-

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stitute pipe or other drains. This, it is submitted, means such ditches as are immediately adjacent to and not separated from the highway; not such as are within the inclosure of the adjoining owner. The case is not very clearly stated as regards the question of ownership; but the presumption would be that the strip of land belonged to the adjoining owner: *Grose v. West*. (1)

[HONYMAN, J. As between the adjoining owner and the lord of the manor.]

In *Steel v. Prickett* (2), Abbott, C.J., ruled that the presumption was, that the waste land which adjoins a road belongs to the owner of the adjoining freehold, and not to the lord of the manor. Such being the presumption of law, it was for the defendants to make out a dedication to the public.

[KEATING, J. Is not that rebutted by the posts and rails?

HONYMAN, J., referred to *Reg. v. United Kingdom Electric Telegraph Co.* (3), where Crompton, J., says, that, "primâ facie, the high road is not confined to the metalled part, but extends to the fences or boundaries of the said high road."]

That leaves untouched the question what is the fence or boundary of the high road. The plan shews that here it is the posts and rails.

Prentice, Q.C. (*H. Tindal Atkinson* with him), for the defendants. It is not contended that the soil of this ditch may not be presumed to be the property of the plaintiff. If it had formed part of the highway, it would not have been necessary to pray in aid the Act of Parliament to justify the board in dealing with it. It may also be conceded that, if there be a strip of land (belonging to the adjoining freeholder) between the highway and the ditch, the provision in question would not apply. The object was to enable the board to remove or prevent nuisances.

[KEATING, J. The case of a nuisance is provided for by the next preceding section. If the posts and rails were put up by the plaintiff or those under whom he claims, and have substantially been maintained by them ever since, would you contend that this was a ditch "at the side of the public road" within s. 15?]

(1) 7 Taunt. 39.

(2) 2 Stark. 463.
(3) 31 L. J. (M.C.) 166, 169. *Spencer 1153.*

Yes. The strip of greensward between the ditch and the roadway is merely the bank of the ditch.

[KEATING, J. But for the posts and rails I should have had no difficulty in assenting to your argument.]

The posts and rails are there merely to prevent persons passing along the road from falling into the ditch. Between A. and A., where the ditch had ceased to exist, the posts and rails had been removed. The narrow green strip between the ditch and the roadway is either part of the road or part of the ditch.

[HONYMAN, J. If the strip of green between the road and the ditch is to be taken as part of the ditch, would you say that the 3-foot strip between the ditch and the 8-foot fence was part of the ditch? The arbitrator does not treat the strip on either side as part of the ditch.]

It is not found that the posts and rails were put up by the plaintiff or his predecessors in title. All is left to inference: and the fair inference from the whole of the case is that the whole space at all events up to the ditch was part of the highway.

Day, Q.C., was not called upon to reply.

KEATING, J. This case is involved in some difficulty from the imperfect findings of the arbitrator. We are left to draw the best inferences we can from the facts as found. The defendants claim the right to fill up the ditch in question under the powers of s. 16 of the West Ham Local Board of Health Act, 30 Vict. c. lvi., which enacts that "the local board, when they think fit, may cause the ditches at the sides of or across public roads and bye-ways and public footways to be filled up, and to substitute pipe or other drains alongside or across such roads and ways, with appropriate shoots and means of conveying water from such roads and ways thereunto, and from time to time to repair and amend the same; and the surface of land gained by filling up such ditches may, if the local board so think fit and direct, be thrown into such roads and ways, and be repairable as part thereof, and be under the control of the local board." The simple question, therefore, is, whether the ditch in question was a ditch "at the side of" Upton Lane, within the meaning of that section. It appears from the case as stated that between the metalled part of the lane and the ditch

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there was a fence consisting of posts and rails two feet high, then a small strip of greensward averaging a foot in width, then the ditch in question, of the average width of five feet, which was divided from the plaintiff's inclosed estate by another strip of greensward about three feet wide. The difficulty I feel in holding this to be a ditch "at the side of the public road" is, the existence of the posts and rails, continued as shewn in the plan in front of the adjoining property from B. to C. If it had clearly appeared that these posts and rails had originally been put up by the surveyor of the highways merely for the purpose of protecting persons passing along the road, I should have had no difficulty in giving to the 16th section the construction contended for by Mr. Prentice. But the case shews that the posts and rails had existed for about forty years, and that they had from time to time been repaired by the owner of the adjoining land, though the surveyor of the highways had on two or three occasions (without the knowledge of the owner) done some repairs to them,—the repair by the former, it would seem, being habitual, by the latter occasional. The defendants, it is conceded, could not exercise the powers they claimed to exercise under s. 16 of the statute without removing the posts and rails; and they have done so. It appears to me that this was not a ditch within the contemplation of that section. It manifestly contemplated open ditches lying by the side of the road, not separated from it by any fence or land belonging to the adjoining owner, and which could be filled up without interfering with or trespassing upon private property. It is not an immaterial fact that a similar fence was continued along the front of the adjoining land. That fact tends to strengthen the inference that it was originally put up by the owner of the land. If so, the local authorities clearly had no right to interfere with it. If the ditch had been a nuisance, it would have come within s. 15. But, for the reasons I have stated, upon the best construction I can put upon the imperfect statements of this case, I am of opinion that the act of the defendants was not justified under s. 16, and therefore that the plaintiff is entitled to judgment.

HONYMAN, J. I entirely agree. The only justification the defendants could have for the trespass complained of is, that their

act was authorized by s. 16 of the local Act. That section impowers them to fill up and add to the highway any open ditch at the side thereof, but not to take from the adjoining owner a strip of land,—whether one foot or ten feet wide is immaterial,—between the highway and the ditch. To enable the local board to act under that section, the ditch must be one which *adjoins* the road. If, as Mr. Prentice urged, the greensward adjoining the road was either part of the road or part of the ditch, it lay on the defendants to make that out. Sitting here as a jury, and drawing the best inference I can from the facts stated, the onus being on the defendants, they cannot complain if the inference I draw from those facts is against them. The arbitrator's statement shews that there is no pretence for saying that the strip of land in which the posts stood was part of the ditch. It is equally clear that it did not form part of the highway. If the posts and rails had been shewn to have been put up by the surveyor of the highways, I agree that that might have shewn it part of the highway: but the finding negatives that; they had been up about forty years, and repaired by the owners of the adjoining land, except upon two or three occasions when the surveyor, without the knowledge of the owner, repaired them. The plaintiff's case is strengthened by the continuance of the posts and rails (though without the ditch) from B. to C. The arbitrator does not state under what circumstances the posts from A. to A. had been removed. The case seems to me to resemble *Doe d. Barrett v. Kemp* (1), as to the presumption of ownership. The statements in the case clearly repel any presumption that this strip of land ever was part of the highway.

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Judgment for the plaintiff.

Attorneys for plaintiff: *Mills & Lockyer.*

Attorneys for defendants: *Wilson & Son.*

(1) 2 Bing. N. C. 102.

END OF EASTER TERM, 1873

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

TRINITY TERM, XXXVI VICTORIA.

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GIBBS *v.* CRUIKSHANK AND OTHERS.

May 27.

Replevin—Judgment recovered—Special Damage—Trespass to Land—Mortgagor and Mortgagee.

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Certain premises were let to the plaintiff by P., who had previously mortgaged them to the defendants, the trustees of a benefit building society, to secure payment of subscriptions, &c., which might become due from him to the society. The mortgage deed gave power to the defendants to distrain the goods of P., on the premises for arrears of subscriptions due to the society, as for rent due on a demise. The defendants distrained on the premises for subscriptions due from P., and seized the plaintiff's goods. The plaintiff replevied the goods, and recovered in the action of replevin, in the county court, as damages, the amount of the expenses of the replevin bond. Having sustained further consequential damages by reason of the seizure of his goods, he subsequently brought an action of trespass in the superior Court, to recover these damages, and also in respect of the trespass to the land :—

Held, that the judgment in replevin was a bar to the action in respect of trespass to the goods, inasmuch as the special damage was recoverable in the action of replevin.

And, with respect to the trespass to the land, that the judgment in replevin was no bar to the action ; but that the defendants were entitled to the verdict on a plea of not possessed, inasmuch as they had done no act to recognize the plaintiff as a tenant.

DECLARATION for breaking and entering the plaintiff's shop and dwelling-house, and removing fixtures and goods of the plaintiff

therein, whereby the plaintiff was prevented and hindered from carrying on his business, and was believed by divers customers of the plaintiff's to be incapable of carrying on his business by reason of poverty and embarrassed circumstances and to be insolvent, and was put to expenses in and about replevying his said goods, &c.

Second count, for seizing and impounding plaintiff's goods.

Pleas: 1. Not guilty. 2 and 3. As to the shop and dwelling-house and as to the goods and fixtures, not possessed. 4. As to the declaration, so far as relates to the goods mentioned in the first count and the goods mentioned in the second count, that the plaintiff, after the accruing of the said causes of action, brought an action of replevin against the defendants in the county court of Middlesex holden at Brentford, then having jurisdiction in that behalf, and therein claimed 50*l.* for damages sustained by the plaintiff, and such proceedings were had in the said action that afterwards and before this suit, on the 9th of August, 1872, by the judgment of the said court, the plaintiff recovered against the defendants 2*l.* 8*s.* 6*d.* for damages adjudged by the said court in the said action to the plaintiff, as by the record thereof yet remaining in the said county court more fully appears; which said judgment still remains in force and not reversed or annulled, and which said action was so brought, and which said judgment was so recovered, and which said damages were so awarded and adjudged to the plaintiff for and in respect of the same identical causes of action herein pleaded to.

Issues, and demurrer to the 4th plea.

Joinder in demurrer.

At the trial which took place before Denman, J., at the Middlesex sittings after Hilary Term, the following facts were proved: The defendants were trustees of a building society, called the Temperance Permanent Benefit Building Society. The acts complained of in the declaration had been done by the defendants in the alleged exercise of a power of distress contained in an indenture of mortgage, dated the 17th of December, 1868, and made between Thomas Parsons of the one part and the trustees of the society of the other part, whereby Thomas Parsons assigned to the trustees the premises mentioned in the declaration, for a term of years, by way of mortgage, for securing the payment by Parsons

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of a sum of 541*l.*, and all fines, interest, and other sums which might become payable by Parsons to the society. It was provided by the mortgage deed that if three of the monthly subscriptions therein provided for should be in arrear and unpaid the trustees might distrain for the amount of any monthly subscriptions and fines which should be in arrear and unpaid, as for rent in arrear upon a common demise.

Parsons, the mortgagor, being in possession of the premises subsequently to the mortgage, let the same to the plaintiff for a term of three years, without the consent or knowledge of the defendants.

More than three of the monthly subscriptions provided for by the mortgage deed being in arrear, the defendants caused a distress to be made upon the premises, of which plaintiff was then in possession, and seized goods of the plaintiff therein. There was no evidence of any taking of fixtures.

The plaintiff brought an action of replevin for the goods in the county court, and recovered judgment therein, as mentioned in the 4th plea, for the expenses of the replevin bond. There was an appeal from the county court to the Queen's Bench, which dismissed the appeal on the ground that the clause of distress in the mortgage deed gave no right to distrain as for rent due against the plaintiff.

On these facts, it was contended on behalf of the defendants, that the judgment in the action of replevin was a bar to the action both in respect of the trespass to the goods and that to the land; and further, that, with respect to the trespass to the land, the defendants were entitled to a verdict on the plea of not possessed.

The verdict was entered for the defendants, leave being reserved to the plaintiff to move to enter a verdict for himself.

The jury were requested, with a view to the possibility of the verdict being ultimately entered for the plaintiff, to assess the damages separately with respect to the trespasses to the land and the goods, and they accordingly gave the sum of 20*l.* with respect to each.

A rule nisi was obtained to enter a verdict for the plaintiff on the first count of the declaration for 20*l.*, and on the second count for 20*l.* non obstante veredicto, pursuant to the leave reserved, on the

ground that the plaintiff was entitled to damages in respect of the goods, although he had recovered in replevin, and in respect of the trespass to the land, on the ground that the plaintiff was in lawful possession and his right thereto was undetermined.

The demurrer came on for argument together with the motion.

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Herschell, Q.C., and *Murphy*, shewed cause, and supported the plea. The recovery in replevin is a bar to the action in respect of the trespass to the goods: Com. Dig. Action, K. 3; *Pease v. Chaytor*. (1) The recovery in replevin is also a bar to the action of trespass to the land. That trespass is merely incidental to the distress; and the plaintiff, having chosen to proceed for the wrongful distress by replevin, has waived the trespass to the land, and cannot now harass the defendants by a second action for what is substantially only part of the same cause of action. (2) Moreover, the defendants are clearly entitled to a verdict on not possessed as to the land. The defendants were mortgagees of the premises, and default was made by the mortgagor under the mortgage. The plaintiff was let in by the mortgagor, subsequently to the mortgage, and the defendants, who had done nothing to recognize him as a tenant, were clearly entitled to treat him as a mere tortfeasor.

[They cited *Roscoe on Real Actions*, p. 642.]

Russell, Q.C., and *Foard*, supported the rule and the demurrer. The previous action of replevin cannot be a bar to the action of trespass to the land, because in replevin no damages can be recovered in respect of the trespass to the land. The cause of action is entirely different. Moreover, there must be taken to have been a substantial trespass to the land here beyond what was incidental merely to the taking of the distress, as the jury have awarded a separate amount of 20*l.* in respect of it.

With respect to the trespass to the goods, the plea of judgment recovered in replevin is no bar to this action. It must be taken, from the damages awarded, that there were special damages con-

(1) 1 B. & S. 658; 32 L. J. (M. C.) 121. *Open MS. 606.*

(2) It will be observed that the 4th plea was only pleaded to the action so far as it concerned the trespass to the goods; but it was agreed by the

parties that the question how far the judgment in replevin was a bar to the action for trespass to the land should be open on the rule, and that any necessary amendments might be made.

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sequential upon the taking of the goods. These the plaintiff could not recover in replevin, in which action, the goods having been already re-delivered to the plaintiff, he can recover by way of damages only the expenses of the replevin bond. The object of proceedings in replevin, for which they were originally intended, is the recovery of the goods themselves, and it is quite contrary to the well-established practice that special damage should be recovered in that form of action. There is no precedent for the recovery of anything beyond the expenses of the replevin bond. Moreover, there is no machinery for the recovery of such damages provided by the county court rules.

[BRETT, J. The case of *Nelson v. Couch* (1) seems in your favour, if you can first establish the proposition that special damage cannot be recovered in replevin.]

With regard to the plea of not possessed as to the land, the plaintiff is entitled to succeed. The mortgagees, the defendants, might, no doubt, have brought ejectment against him, or entered with a view of dispossessing him, but they have chosen to treat him as a tenant. They entered not to dispossess him, but to distrain as for rent. They, therefore, did not treat his possession as unlawful, and, the distress proving unlawful, they cannot now turn round and justify the entry which they made under colour of an alleged right to distrain, as being an exercise of their rights as entitled to possession.

[They cited, with reference to the question how far the judgment in replevin was a bar to the action of trespass to the goods, Mayne on Damages, 2nd ed. p. 319; Com. Dig. Action, L. 4; *Lacon v. Barnard* (2); *Ferrer's Case* (3); Archbold's Practice, 11th ed. p. 1082; *Grace v. Morgan*. (4)]

BOVILL, C.J. The questions raised in this case, either by the demurrer or upon the motion, were, whether the previous recovery in replevin is a bar to an action for damages for trespass in respect of the same taking of the same goods; whether such recovery is a bar to an action for trespass to the land; and, further, whether the

(1) 15 C. B. (N.S.) 99; 33 L. J.
 (C.P.) 46. *10 June N.S. 306*

(2) Cro. Car. 35.

(3) 6 Co. 7.

(4) 2 Bing. (N.C.) 534.

defendants, upon the facts, are not entitled to a verdict, with respect to the alleged trespass on the land, on the plea of not possessed. With regard to the first question, quite independently of authority, I should have been of opinion that the recovery in replevin is a bar. The party whose goods have been wrongfully seized has a choice of remedies open to him. He may bring trespass to recover damages for the taking of the goods, but it may be that this remedy is inadequate, and the immediate recovery of the goods themselves may be of greater consequence to him than the recovery of damages. In very early times it was found that grievances arose in such a class of cases, for instance, as when a tenant's cattle or horses on his farm, which he might require for agricultural purposes, were seized, as he contended, wrongfully, and a remedy was provided by means of the ancient writ of replevin which issued out of Chancery. This remedy was found to be tedious and inconvenient, and by the statute of Marlbridge (1) proceedings were authorized to be commenced immediately in the county court, which in time became the ordinary mode of procedure. These proceedings might be continued in the county court, or removed into the superior Court by writ of recordari or pone. The nature of the complaint in the action was for a tortious taking of the goods. If they had been re-delivered by the sheriff, then the complaint in the declaration was that the goods had been taken and detained until &c., meaning, until they were re-delivered by the sheriff upon sureties being found. But, if the goods were not re-delivered by the sheriff, the plaintiff might complain that they were still detained, or, to use the old expression, might declare in the detinet. In cases where the goods were returned, in the majority of cases there would be no damages beyond the expenses of the replevin bond, and these became in practice fixed and ascertained in different counties at slightly different sums. When the goods were not re-delivered by the sheriff, according to the books it would appear that the plaintiff could recover the full amount of the damages that he had sustained by the taking of the goods. I am not aware of any authority to the contrary, and I see no reason in principle why there should be any limitation as to the amount of the damages recoverable in such a case. I do not know

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any ground in law for confining the damages to the amount of the expenses of the replevin bond. In practice these expenses are all that are recovered, merely because there is generally no other damage. The form of the declaration in replevin states that a wrongful act has been committed by taking the goods, and claims for the damages that have accrued to the plaintiff by reason of such wrongful taking. It appears to me that whatever damages have been actually sustained may be recovered. In this case the amount of the damage sustained was assessed in the county court at 2*l.* 8*s.* 6*d.* And it must be taken that on the evidence given before that court the only damages shewn were the ordinary damages, viz. the expenses of the replevin bond. It does not follow, because, by agreement between the parties, or by the finding of the jury in the present action, another amount has been fixed upon, that, therefore, the whole of the damages sustained by the plaintiff are not to be considered as covered by the judgment of the county court. The test whether a previous action is a bar is not whether the damages sought to be recovered are different, but whether the cause of action is the same. Here the cause of action is the same in both actions, viz. the taking and detaining of the goods. On these grounds, I am clearly of opinion that the action is not maintainable in respect of the trespass to the goods. The case of *Nelson v. Couch* (1) is no authority to the contrary. That decision turned on the peculiar jurisdiction of the Court of Admiralty with regard to proceedings in rem; and the cause of action there was not the same in both cases, inasmuch as in the Court of Admiralty there was only a limited right and a limited remedy in respect of a portion of the matter complained of. In this case all the damages sustained might have been recovered in the action of replevin.

We then come to the question whether the plaintiff is entitled to recover in respect of the alleged trespass to the land. With respect to this, I think the judgment in replevin is no bar. The action of replevin has no relation to the trespass on the land. The plea is, therefore, rightly pleaded to the cause of action so far as it relates to the taking of the goods. It is unnecessary, on this point, to do more than advert to the principles I have already enunciated

(1) 15 C. B. (N.S.) 99; 33 L. J. (C.P.) 46. *10 June 45 366*

with reference to the first point. The judgment is not a bar, because it was not in respect of the same cause of action.

I am, however, of opinion that the defendants are entitled to the verdict on not possessed. It is said that the plaintiff can recover in respect of the trespass to the land, because he was the person in actual possession. It is clear, however, that the defendants were the real owners and entitled to the possession of the land, and as against them the tenant could be at the very most merely a tenant at sufferance, and could not maintain trespass as against them. The law entitles the real owner to maintain ejectment without any previous demand of possession against a tenant at sufferance, and to treat him as a mere tortfeasor. It is obviously inconsistent that the plaintiff should be entitled to treat the defendants as tortfeasors in respect of anything they may do on their own land. The principles that govern the relations of mortgagors and mortgagees are clearly stated in the notes to *Keech v. Hall*. (1) It is there stated that if there be an express agreement in the mortgage deed that the mortgagor shall remain in possession for a certain time, he has an interest in the nature of a term of years during such time; but, upon expiration of such period, if there be default in payment of the money, the mortgagor becomes a mere tenant at sufferance. If he then lets in tenants, they may be treated as tortfeasors. Parsons appears here to have been a mere tenant at sufferance, and it was stated in the judgment in *Thunder v. Belcher* (2) that one tenant at sufferance cannot make another. The plea of not possessed puts in issue the question of right to the possession as against the defendants. The plaintiff here was not entitled to possession as against the defendants, for he was never recognized by them as a tenant in any way. They had done nothing to interfere with their right to bring ejectment against him, or to treat him as altogether a tortfeasor. It would be a monstrous inconsistency to hold that, under the circumstances, he could be entitled to maintain trespass against them. There will, therefore, be judgment for the defendants on the demurrer, and the rule will be discharged.

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(1) 1 Sm. L. C. 537.

(2) 3 East, 449.

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KEATING, J. I am of the same opinion. I agree with my Lord that the plaintiff cannot recover in respect of the taking of the goods for which he had already recovered judgment in replevin. The judgment in replevin is, in my opinion, a bar to any subsequent action for the same taking of the same goods. It was urged that this was not the case, because the plaintiff could not recover the special damage in replevin. We have not been referred to any authority for this proposition. There is really nothing to shew that it is so, but the fact that, according to long existing custom, the usual damages are the expenses of the replevin bond. There seems to be no reason, looking to the form of the declaration in replevin and the nature of the action, why the plaintiff should be precluded from recovering the damages which he has sustained in consequence of the detention of his goods in the action of replevin. I likewise agree with my Lord that the recovery in replevin cannot be a bar to an action for the trespass to the land, or for the taking of fixtures which could not be the subject of replevin. I think, however, that, on the issue on the plea of not possessed, the plaintiff must fail as to the alleged trespass on the land. The defendants were the mortgagees of the land in question, and the mortgagor had after the mortgage given the plaintiff possession of the land. The defendants were no parties to this, and had not in any way recognized the plaintiff's tenancy. They could, according to the ordinary law on the subject, have brought ejectment against the plaintiff without a previous demand of possession. If the plaintiff were merely tenant at sufferance, why should it be necessary that the defendants should enter on their own land with any particular motive? The argument on the part of the plaintiff has only to be stated to shew that it cannot be maintained. It would be absurd that the defendants, having a right to bring ejectment against the plaintiff without any demand of possession, should at the same time be liable to be treated by him as trespassers.

BRETT, J. It is argued, in the first place, that the plaintiff can maintain the action in respect of the consequential damages arising from the taking of the goods, although he has recovered in replevin in respect of the same taking of the same goods, on the ground

that, inasmuch as he could not by law have reparation beyond a certain extent in the action of replevin, and has suffered damage to a greater extent, he is entitled to recover in an action of trespass the damages that he could not recover in replevin. If it were true that he could not in replevin recover reparation beyond a limited extent, the case of *Nelson v. Couch* (1) would be a strong authority to shew that he could recover in trespass. In that case the plaintiff proceeded before the Court of Admiralty in respect of damage arising from a collision; and inasmuch as in the Court of Admiralty the proceeding was in rem, and the extent to which compensation could be recovered limited, it was held that the plaintiff might recover in the common law court what he had failed to recover in the Court of Admiralty. If the plaintiff's counsel could have made good the proposition that the plaintiff could not have recovered these damages in replevin, I think they would have sustained their contention. I am, however, of opinion, on consideration, that they have failed to do so. Replevin is a common law action for the taking of goods. By the course of procedure in that action the goods are returned in the course of the action. It was argued by Mr. Foard, that the action was for the mere purpose of recovering back the goods. I do not think that can be so, for if so, the plaintiff could never have recovered what in every action of replevin he does recover, the expenses of the bond. It seems to me that wherever, in a common law action, the plaintiff can recover damages, he must be entitled to recover all the legal damages he has sustained. Some of these damages are called common and others special damages. There is no essential difference between the two, further than that the latter must be specially mentioned in order to give notice to the defendant that they are claimed. I can find no authority that special damages cannot be recovered in replevin. It is stated in a note to Mayne on Damages, 2nd ed. p. 319, that it is doubtful whether they can be, but the case there cited from Leonard's Reports does not seem to be applicable, and the Irish case also cited seems to be only an expression of the same doubt that was once entertained with respect to an action of trover in this country. The result is that the plaintiff has already recovered damages in respect of the

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(1) 15 C. B. (N.S.) 99; 33 L. J. (C.P.) 46.

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same cause of action in a form of action in which he could have recovered the damages that he now claims. That he did not recover them is immaterial.

With regard to the alleged trespass to the land, I agree that the recovery in replevin is no bar. The plaintiff, however, must fail, upon the ground that he was not entitled to hold this land against the defendants. According to the rule laid down in *Keech v. Hall* (1), even if Parsons were a tenant at will to the defendants, he could not create a sub-tenancy as against them. As against the defendants, therefore, the plaintiff was a mere tort-feasor. It is said, that by reason of the act of trespass complained of the defendants acknowledged the title of the plaintiff to hold as against them. I can find no authority for any such a contention, which amounts to saying that a mere tort-feasor could maintain an action for a trespass.

GROVE, J. I am of the same opinion. I entertained at first some doubt with respect to the question whether the recovery in replevin was a bar to the action for trespass to the goods. The expression of a doubt on the question whether special damage could be recovered in replevin in the note to *Mayne on Damages*, and in *Chitty's Practice*, together with the apparently universal practice of not giving more than the expenses of the replevin bond, appeared to me to render the question a little doubtful. But the onus of satisfying us that these damages could not be recovered lies on the plaintiff, it appears to me; and though in practice they have not been recovered, he fails to shew that the law is that they cannot be.

On the other points I agree with the rest of the Court.

*Judgment for the defendants on demurrer,
and rule discharged.*

Attorneys for plaintiff: *Wilkinson & Howlett.*

Attorneys for defendants: *Shaen & Roscoe.*

ROBINSON v. KNIGHTS.

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May 31.

Ship and Shipping—Charterparty—Lump Freight—Loss of Part of Cargo by Perils of the Sea without Default of Shipowner—Deduction from Freight.

A charterparty from Riga to London provided that the ship should load a full and complete cargo of lath-wood, and deliver the same on being paid freight as follows; a lump sum of 315*l*. There was the usual exception of sea risks, and the freight was to be paid half on arrival, and the remainder on unloading and right delivery of cargo. Part of the cargo, loaded in accordance with the charterparty, was lost by perils of the sea, without any default of the master or crew:—

Held, that the shipowner was, on delivery of the remainder of the cargo, entitled to the full sum.

THIS was an action in the Mayor's Court.

The declaration was in the ordinary form of *concessit solvere*, and the defendant pleaded never indebted.

At the trial, before the Common Serjeant, the facts were as follows. The action was brought to recover a sum of 16*l*. 19*s*. 9*d*., as balance of freight due upon a charterparty. It was agreed by the charterparty that the ship should proceed to Riga, to load at Bolderaa or Mullgraben a full cargo of lath-wood, the ship to be provided with a deck load, not exceeding what she could reasonably stow, &c., and should then proceed to London, and deliver the same on being paid freight, as follows; a lump sum of 315*l*. There was the usual exception of sea risks, and it was stipulated that the freight should be paid in cash, half on arrival, and the remainder on unloading and right delivery of the cargo, less four months discount on half, at five per cent. per annum. A cargo was loaded in accordance with the charterparty. The ship meeting with rough weather, the deck load was washed overboard and lost without any default on the part of the master or crew. The freighter, the defendant, on the delivery of the cargo, claimed to deduct from the freight as a proportionate amount in respect of the freight of the deck load so lost, a sum of 16*l*. 19*s*. 9*d*., and paid only the balance of the lump freight after making such deduction. The action was brought to recover the amount so deducted.

On these facts the verdict was entered for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit, on the

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ground that there was no evidence in support of the plaintiff's claim, and that the evidence did not entitle the plaintiff to recover the whole of the freight mentioned in the charterparty. A rule nisi had been accordingly obtained, against which

Grantham shewed cause. The lump freight is a sum to be paid for the use and hire of the ship for the voyage. It is not a sum to be calculated and paid upon the amount of the goods actually carried. It is clear law that, if the ship be not fully laden, the whole of the lump freight is nevertheless recoverable. The goods lost were lost by perils of the sea within the exception in the charterparty, without default on the part of any one for whom the shipowner was responsible. [He cited *The Norway* (1); *Abbott on Shipping*, 11th ed. p. 367; *Roccus*, 75; *Hunter v. Fry* (2); *Dakin v. Oxley*. (3)]

Cock supported the rule. He contended that the lump freight must be considered as a sum payable in respect of the full cargo contemplated by the charterparty, and that, as such freight was only to be payable on right delivery of the full cargo, all that the plaintiff was entitled to on delivery of less than a full cargo was a proportionate part of such lump freight.

KEATING, J. I am of opinion that this rule should be discharged. The question is whether the shipowner is entitled to recover the whole of a sum of money described as lump freight without any deduction in consequence of the loss of deck cargo, such loss not having occurred through any default of the shipowner. By the charterparty the ship is to go to Riga and to load at two places specified near there, a full cargo of lath-wood, and the ship is to be provided with a deck load. After loading she is to proceed to London and deliver the cargo on being paid freight, a lump sum of 315*l*. The freight is to be paid in cash, half on arrival and the remainder on the unloading and right delivery of the cargo. The ship took a full cargo and a deck load as contemplated by the charter. The deck load was lost by perils of the sea without any default of the shipowner. The question is

(1) *Brown. & Lush.* 226; 3 *Moo.* (3) 15 C. B. (N. S.) 646, 650; 33 P. C. (N. S.) 245. 11 Jan 1892. L. J. (C. P.) 115. 10 Jan 1895.
(2) 2 B. & A. 421.

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whether, under these circumstances, the plaintiff, the shipowner, is entitled to recover the full sum of 315*l.* or must make a proportionate reduction in the amount.

Now, it seems to me clear that, under a charter like this, if the charterer had loaded less than a full cargo, the shipowner would still be entitled to the full freight, and the question is whether there can be any distinction in principle between a case of deficiency in the cargo caused by less than a full cargo having been originally put on board and a deficiency caused by perils of the sea without default on the shipowner's part. It seems to me that on principle there cannot be any distinction. The only case cited when the rule was moved was *The Norway* (1), a case decided in the Admiralty Court in the time of Dr. Lushington, which afterwards came before the Privy Council. There the charterparty was not precisely identical with that in the present case; but the case is not distinguishable in principle. The Judicial Committee held that the shipowner was entitled to the lump freight without any deduction in consequence of a loss of part of the cargo occurring by perils of the sea without negligence on the part of the shipowner. The terms of the charter, though not identical with those of that before us, were very similar in almost every respect. There a portion of the lump sum was to be paid in advance and the remainder upon true and final delivery of cargo at port of discharge.

As pointed out by my Brother Brett, the Lord Justice Knight Bruce says, that, though the charter calls it lump freight, it is really a sum paid for the use and hire of the ship, and is to cover both the outward and homeward voyage. I do not think there is any substantial distinction between the two cases in that respect. Here in truth the sum was an entire sum to be paid for the hire of the ship for one entire service. What was that service? Was it the bringing to and delivering at the port of discharge of all cargo originally put on board, or of all cargo which was put on board and not lost by the perils of the sea without default on the part of the shipowner? It is said by Knight Bruce, L.J.: "Although the lump sum is called freight in the charterparty and bills of lading, we think it is not properly so called, but that it is

(1) *Brown. & Lush.* 226; 3 *Moo. P. C. (N.S.)* 245.

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more properly a sum in the nature of a rent to be paid for the use and hire of the ship on the agreed voyages. It was objected on behalf of the respondent that by the charterparty the remainder of the lump sum is made payable only on 'true and final delivery of the cargo at the said port of discharge.' But this does not necessarily mean that the whole of the cargo originally shipped must be delivered." I think the same construction can be put on this charter. The better opinion appears to me to be that, where there is a lump freight, the shipowner is entitled to be paid the whole of it, although a portion of the cargo be lost without default on his part.

BRETT, J. The terms of the charter are not precisely the same in this case as in the case of *The Norway* (1), but I think that the freight in both cases is a stipulated gross sum to be paid for the use of the whole ship for the whole voyage. The rule is that in such a case the whole of the gross sum is payable, even although the freighter did not fully load the ship. In other words, the shipowner puts his ship at the disposal of the freighter to load with a full cargo if the freighter pleases, but whether he pleases or not he is bound to pay the lump sum. It follows that what is really paid for is the use of the ship for carrying such cargo as the freighter chooses to put on board. It appears to me that this charter is substantially the same as that in *The Norway*. (1) In *The Norway* (1) the freight was called lump freight in both Courts and was so treated. That is to say, the freight is a gross sum for the use of the entire ship instead of being paid in respect of each part of the cargo. The provision that part was to be paid on delivery of cargo existed in *The Norway*. (1) The question is, what cargo? It is admitted that the loss arose here not only without default of the plaintiff but by reason of perils of the sea within the exception of such perils contained in the charterparty.

In the case of *The Norway* (1) the Privy Council seem to have doubted whether, if the part lost were lost through negligence for which the shipowner was responsible, even then the charterer must not pay the whole freight, being left to his cross action for the negligence. It is unnecessary to deal with this question here, for

(1) Brown. & Lush. 226; 3 Moo. P. C. (N.S.) 245.

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it appears that there was no such negligence. It seems to me that *The Norway* (1) is distinctly in point, and, though not absolutely binding on this Court as an authority, it seems to me to put the true interpretation on a charterparty of this description, viz. that the charterer is bound to pay the whole of the freight for whatever cargo is brought to and delivered at the port of discharge.

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Rule discharged. (2)

Attorneys for plaintiff: *Webb & Pearson.*

Attorneys for defendant: *Parson & Lee.*

(1) 3 Moo. P. C. (N. S.) 245.

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(2) Q.B. MERCHANT SHIPPING COMPANY *v.* ARMITAGE. June 6.

By charterparty a ship was to load at Colombo or Cochin a full and complete lading, and proceed to London and discharge there, fire and other dangers of the sea excepted, a lump sum freight of 5000*l.* to be paid after the entire discharge and right delivery of the cargo.

Part of the cargo having been lost by fire, and the rest delivered in London, the defendant, the charterer, contended he was only bound to pay in proportion to the cargo delivered; the plaintiffs, the shipowners, contended they were entitled to the lump sum of 5000*l.*

Sir J. B. Karslake, Q.C. (Petheram with him), for the plaintiffs, relied on *The Norway* (3 Moo. P. C. (N. S.) 245). *1873 48892*

Watkin Williams, Q.C. (Cohen with him), for the defendants, distinguished that case on the ground that the lump sum there was for a voyage out and home.

THE COURT (Blackburn, Quain, and Archibald, JJ.) gave judgment for the plaintiffs. The decision in *The Norway* had been followed by the Court of Common Pleas in *Robinson v. Knights*, and there, as here, the charterparty was for a single voyage only. *affirmed 494 B. 99, 101*

Attorney for plaintiffs: *E Saxlow.*

Attorneys for defendant: *Thomas & Hollams.*

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FOLKARD *v.* THE METROPOLITAN RAILWAY COMPANY.

June 3.

Mayor's Court Procedure Act (20 & 21 Vict. c. clvii.) ss. 8, 10—New Trial—
Leave reserved—"Upon Trial of any Issue."

94BD36 By the Mayor's Court Procedure Act, s. 10, it is provided that if the judge, "upon the trial of any issue," shall grant leave to move in any of the superior Courts to enter a verdict or nonsuit, or for a new trial, the party to whom such leave is granted may move accordingly, in such Court, within the time within which motions of the like kind may be made in such Court.

Where in a case tried on Thursday the judge, immediately after the trial, refused leave to move, but on the following Monday changed his mind and granted it:—

Held (by Bovill, C.J., and Keating and Grove, JJ., Brett, J., dissenting), that the leave could not be considered as given "upon the trial of the issue" in accordance with the Act.

THIS was an action in the Mayor's Court. At the trial, which took place on a Thursday, the Deputy Recorder nonsuited the plaintiff, and, on being applied to for leave to move for a new trial, refused to grant the application. On the following Monday, however, he stated to the counsel for the plaintiff that he had reconsidered the matter, and gave leave.

A rule nisi had been accordingly moved for and obtained for a new trial, on the ground of misdirection, against which

Kemp shewed cause. He contended that the leave was not granted in accordance with the provisions of the Mayor's Court Procedure

(1) By the 10th section of the Mayor's Court Procedure Act, 20 & 21 Vict. c. clvii., it is provided as follows: "If upon the trial of any issue the judge shall grant leave to the plaintiff or defendant to move, in any superior Court, to set aside a verdict or a nonsuit, and to enter a verdict for the plaintiff or the defendant, or to enter a nonsuit, as the case may be, or for a new trial, the party to whom such leave may have been given may apply by motion to such superior Court within such period of time after trial as motions of the like kind shall from time to time be permitted to be made in such superior Court, for a rule to shew cause why such verdict or non-

suit should not be set aside and a verdict entered for the plaintiff or the defendant, or a nonsuit entered, or why a new trial should not be had, as the case may be, in such action," &c. The 8th section of the Act gives a party dissatisfied with the determination of the Court in point of law an appeal in cases when the sum sought to be recovered exceeds 20*l.* to any of the superior Courts, "provided that such party shall, within two days after such determination or direction, give notice of appeal to the other party or his attorney, and shall also give security within such time or times as the court shall direct, &c., for the costs of the appeal."

Act, 20 & 21 Vict. c. clvii. s. 10 (1), on the ground that that section only entitles the presiding judge to reserve leave upon the trial of the issue, and that the judge having immediately after the trial refused leave, and not having ultimately granted it till three days after, it could not be said to have been granted upon the trial.

Talfourd Salter, in support of the rule, contended that "upon" the trial must mean within a reasonable time "after" the trial, and that the leave was given within such time. [He cited *Vaughan v. Watt*. (1)]

BOVILL, C.J. Questions have arisen with regard to the time within which various things must be done under the provisions of many Acts of Parliament, the language of which slightly differs. Here the Act provides that leave must be given "upon the trial." That clearly does not mean during the trial, but, as it appears to me, it must mean within a reasonable time afterwards. The correct rule as to such cases was indicated by Maule, J., in the case of *Shuttleworth v. Cocker* (2), where he says with relation to a certificate for costs: "It is not necessary to enter into the question whether or not the certificate under this statute must be granted immediately, but I should rather say that it was the intention of the Act to exclude any impression being made on the mind of the judge except what was produced at the trial." Bosanquet, J., in the same case, says: "I am strongly inclined to think that it ought to be granted as soon as the cause is heard, and that it should not be left for a future period unless the application is made directly, and the judge by consent takes time for consideration." That case was cited in the subsequent case of *Thompson v. Gibson* (3), which also arose in respect of a certificate for costs; and Lord Abinger there says with regard to the meaning of the words "immediately afterwards:" "I think we should interpret them to mean within such reasonable time as will exclude the danger of intervening facts operating on the mind of the judge so as to disturb the impression made upon it by the evidence in the cause; and I am disposed to adopt the construction put upon the clause by my Brother Maule, that the certificate is to be the result of the judge's impression at the time." Alderson, B.,

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in his judgment in the same case, cites *Pybus v. Mitford* (1), to the effect that "though the word 'immediately' in strictness excludes all mesne time, yet to make good the deeds and intents of parties, it shall be construed such convenient time as is reasonably requisite for doing the thing." The judgment of Rolfe, B., is to the same effect, accepting the view of Maule, J. with the additional qualification that it is to be done with all convenient speed.

Applying the principles thus laid down to the present case, we have here to consider whether the leave was granted upon the trial, or within a reasonable time afterwards. At the time of the trial the application for leave was made and refused upon the impression made on the judge's mind at the time. It appears to me that the application and refusal so made determined the reasonable time, and any subsequent application would be too late. If it were not so, it seems to me that the 8th section of the Act shows that the extreme limit of time during which leave might be given would be two days. I do not mean to say that within two days would be a reasonable time, but that period, as fixed by the section, gives some idea of what the legislature intended by "upon the trial," and shews that they could not have contemplated a period greater than two days by the expression. I am therefore clearly of opinion that the application on the Monday following the trial was not granted "upon the trial" within the meaning of the 10th section, more especially when an application had been made immediately after the trial and refused.

The rule must therefore be discharged.

KEATING, J. I am of the same opinion.

BRETT, J. The substance of the sections of the Acts with reference to the question before us appears to be that when the judge is of opinion that the facts raise a fair question for the superior Court, the party against whom he rules is to have leave to move within the usual time for motions for new trials, viz. within four days after the trial, and in such case the party is not bound to give security for costs. In cases where there is no leave, but the party chooses on his own view to appeal, he is restricted to two days for giving notice of appeal, and must give security for costs.

(1) 2 Levinz, 77.

The substance and justice of the thing appear to me to be that, when the judge thinks that there is a question for the superior Court, the party shall have the usual time for moving, viz. four days. The leave is to be given, as it seems to me, without any interference of the party against whom it is given, and the judge might, if he thought fit, decline to hear any argument on his behalf. It is simply a question for the judge upon the application of the party asking for leave. It is therefore immaterial, so far as the other party is concerned, whether he is present when the application is made or not. Then, does the Act provide that the application must be made immediately after the trial? The word "immediately" is not used in the Act, though it is used in an Act in *pari materiâ*. The words used are, "upon the trial." "Upon" here cannot mean "during," so it must be construed as meaning "after." When the legislature in the very same section of this Act, and also in the 8th section, desires to limit a particular time for any proceeding, a particular time is expressly mentioned. The motion for the new trial is to be within four days. The case, therefore, stands thus: "Upon the trial" means "after the trial," and no particular time is limited. The result seems to me to be that the thing must be done within a reasonable time after the trial. Then, what is a reasonable time? I should have thought that, as the party is by the section to have four days to move in after the trial, nobody is hurt if the judge gives leave to move at any time within the four days. It is then urged that the judge could not give leave subsequently, having once refused to do so. That is to say, that the judge having once given a decision which he has subsequently seen reason to think a mistaken one, is to be estopped from setting it right, although the position of the parties has not really been altered from that which it would have been if he had decided rightly at first, and although in the absence of the previous decision his subsequent decision would have been in time. It seems to me that, if the original application might have been made within the four days, the judge is not estopped from changing his mind within that time. I therefore think the leave was in this case given in time.

GROVE, J. I am of opinion that this rule should be discharged.

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I agree that the word "upon" must mean not "during" but "after" the trial, but I do not think that such an interval was contemplated as three days. The cases that have been referred to with respect to the construction of expressions similar to those in this Act seem to shew that the lapse of so considerable an interval of time was not contemplated. It is not like a case where the judge had taken time to consider; in which case the matter is adjourned, and the party against whom the application is made may generally be considered to some extent as consenting, inasmuch as he does not insist on the judge's immediately deciding. It is not even like a case where nothing has been done immediately on the conclusion of the trial. If there has been no refusal to grant the leave, the party against whom the leave is granted may remain in expectation that within a reasonable time there may be an application. Here the application had been made and refused, and the successful party was entitled to consider the matter finally settled. Then, during two days the opposite party has an absolute right of appealing. He does not exercise this right, and at the end of two days the other party may naturally consider that the case is concluded. If he lived abroad, he might have gone home under the impression that the whole matter was at an end, and great inconvenience would be caused if the judge could afterwards alter his decision. The utmost extent to which the reasonable time for giving leave might be considered as extending seems to be the two days within which there might be a notice of appeal. It might possibly be contended that up to the expiration of that period, and while the matter was so far pending as that there might be an appeal, the successful party might be bound to entertain an expectation of an application for leave to move, though it is not necessary to express any opinion as to that in the present case. I am clearly of opinion that after the expiration of that period the reasonable time for giving leave had expired.

Rule discharged.

Attorney for plaintiff: *Long.*

Attorneys for defendants: *Burchells.*

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June 3.

Measure of Damages—Contract in the Alternative—Judgment by Default.

The declaration stated that the plaintiff having shipped certain goods to a place abroad drew against the shipment, and entrusted the drafts to the defendant for presentment, for reward to the defendant, on the terms that the defendant should return the drafts if not paid after acceptance to the plaintiff, or pay the plaintiff the amount of them; that all conditions were performed, &c., necessary to entitle the plaintiff to a return of the drafts or to payment of the amount of them, yet the defendant did not return the drafts nor pay the amount of them. Judgment was signed for want of a plea :—

Held (per Keating, Brett, and Grove, JJ., Bovill, C.J., dissenting), that the damages on the contract alleged in the declaration must be the amount of the bills.

Per Bovill, C.J. : The contract as alleged in the declaration being a contract in the alternative, it might be performed by performance of either branch of the alternative at the election of the defendant, and therefore the damages might be the value of the bills, if of less value than the amount for which they were drawn.

DECLARATION, for that the plaintiff had caused certain goods to be shipped in London on board ship, to be carried, subject to certain bills of lading, to Rosario in South America, in order that they might be delivered to one C. W. Bollaert there on his accepting certain drafts drawn by the plaintiff on him against the goods; and thereupon the plaintiff delivered to the defendant, and the defendant accepted from the plaintiff, the said bills of lading and drafts, upon the terms that the defendant should cause the drafts to be presented at Rosario to Bollaert for acceptance, and that in the event of the said drafts being duly accepted the defendant should deliver over to Bollaert the said bills of lading on his accepting the drafts, and should cause the drafts to be presented for payment at maturity, and remit to the plaintiff the proceeds of the drafts if the same should be paid; and that, if the drafts should not be paid, the defendant should either return the same to the plaintiff, or pay him the amount, for reward to the defendant in that behalf; and although the defendant accordingly presented the said drafts for acceptance by Bollaert, and he accepted the same, whereupon the defendant delivered to him the bills of lading, and although all things were done and happened

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and all times elapsed necessary to entitle the plaintiff to have the drafts returned to him or the amount thereof paid by the defendant to him, and to maintain this action, yet the defendant did not nor would return the drafts, nor did nor would the defendant pay to the plaintiff the amount thereof.

Judgment went by default for want of a plea, and on a writ of inquiry before the sheriff it was contended by the defendant's counsel that upon the declaration as framed the jury were entitled to assess the damages at the value of the bills, and not the amount of them.

The jury found that the bills were worthless, and a verdict was entered for the plaintiff for a farthing damages.

A rule nisi had been obtained for a new trial, or to increase the amount of the verdict to 107*l.*, the balance of the amount of the bills, after deducting certain payments on account.

McLeod shewed cause. The promise alleged in the declaration is an alternative promise to do one of two things, either to return the bills or pay the amount of them, and the breach alleged is not doing either of the two alternatives. The damages for such a breach are not, necessarily, the amount of the bills. Of the two alternatives the defendant was entitled to select the least burthensome. If the jury thought the bills worthless, as they did, they were entitled to give nominal damages. They have to ascertain by what amount the plaintiff would have been the better if the contract had been performed; and, as the contract alleged would have been performed by the return of the bills, if the bills were of no value he has lost nothing. This case is not as if the plaintiff had alleged a contract by the defendant to return the bills, and if not then to pay the amount, and that the bills were not returned, and for a breach non-payment of the amount. The case would then have been within the authority of *Lowe v. Pears*. (1)

Garth, Q.C., in support of the rule. The question is, what is the reasonable construction of the contract alleged in the declaration. The Court is entitled in construing the declaration to look at the facts alleged, and give a reasonable construction to the contract alleged with reference to those facts. It is plain that the contract meant that

the defendant was to return the bills, and that, if he did not, he was to be bound to pay the amount of them. He has the option, in the first instance, of returning the bills, but, if he does not do so, he has no longer any option, but must pay the amount. It is obvious, if the contract be so construed, the damages for the failure to perform either alternative will be the amount of the bills. The breach is not very artistically framed; but, construing it reasonably with reference to the meaning of the contract alleged, it is submitted that the amount of the bills is the measure of the damages resulting from it.

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GROVE, J. The question in the present case turns upon the construction to be put upon the promise alleged in this declaration. The question is an extremely doubtful one, and unfortunately there is a division of opinion in the Court. I think, with the majority of the Court, that the true construction of the promise alleged is, that it is not in the strictest sense an alternative promise, but a promise that the defendant would return the bills, and if he did not return them he would pay the amount of them. In that case it is clear that the defendant would be bound, if he did not return the bills, to pay the amount of them. The promise relates to a matter of business, and must receive the construction which would be given to the language used by business men in the ordinary course of business. If, in the ordinary affairs of life, I say to a man, I will return your horse to-morrow, or pay you a day's hire of him, the only reasonable construction is, that, if I do not return the horse, I will pay a day's hire. If the use of the word "or" compels us to regard this as a purely alternative promise, then the same construction would be applicable to the case I have taken as an illustration, which would be plainly unreasonable. Here the parties seem to me by their agreement to have said that they will not estimate the damage to accrue to the plaintiff by the non-return of the bills at the actual value of the bills, whatever it may be; but they choose to say that, if the bills are not returned, the defendant shall be bound to pay the amount of them. The plaintiff might not choose to take the risk of a change of circumstances, which might affect the value either way, but might prefer to assess the value at the amount of the bills. It seems to me that the question is, what is the meaning of this promise in ordinary

1873 parlance, and we are entitled to give it such meaning for the
DEVERILL ³ purposes of the present application. I, therefore, think the rule
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BRETT, J. I am of the same opinion. The declaration in the present case states facts which shew a business relation between these parties, and proceeds to set out a contract made between them bearing reference to such relation. It appears to me that, when a business contract with relation to business matters is set out in a declaration, the Court is entitled to construe it according to the ordinary rules applicable to the construction of mercantile contracts; that is to say, not merely according to the strict rules of grammar, but so as to give a business meaning, and not a fanciful meaning, to every part of it. The promise here set out is that the defendant would either return the bills or pay the amount of them. That promise must be construed as if we had to construe it directly after it was made; and we have no right to consider what may have happened at a subsequent period. If the promise had been simply to return the bills, the law would have implied that, if the bills were not returned, the defendant should be bound to pay the damages actually occasioned to the plaintiff, which might be equal to, or less than, the amount of the bills. If the parties making this business contract had intended this, they would have contented themselves with making an agreement that the bills should be returned; but they are not content with making this agreement, and they make a further promise, to which, as it seems to me, we are bound to give a meaning. The promise is to return the bills or to pay the amount of them. That is the same as if they had said the defendant should return the bills, or pay 200*l.*, or whatever the amount might be. If that does not mean that he should return the bills, and if not should pay 200*l.*, I do not see what business meaning it could have. The plaintiff is entrusting the bills to the defendant in order to be presented for acceptance, and ultimately for payment; if dishonoured, he may wish to deal with them himself; he therefore makes a stipulation to insure their return,—that if the defendant will not return them, he shall pay the amount of them. If this be the proper construction of the promise, we are entitled, as it seems to me, to construe the

breach alleged with reference to such promise, and give it a construction which shall not alter the effect of the contract. The whole case, therefore, depends upon the true construction of the contract. If this be what I conceive it to be, it follows that the damages for the breach of it are the amount of the bills. I am therefore, of opinion that the rule should be made absolute.

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KEATING, J. I have entertained considerable doubt during the course of the argument, and I cannot say that my doubts are entirely removed. I have come, however, to the conclusion that the contract as alleged in the declaration is not to be considered such as, according to the strictest construction of the words used, it might perhaps appear to be; but that it is really a contract to return the bills to the plaintiff, or, if they are not returned, to pay the amount of them. The difficulty in the case seems to me to arise from the way in which the breach is laid. It appears to me that it would have been competent to the pleader, in declaring on the contract, to treat it as a contract to the effect I have before stated. He seems to have got into difficulty by declaring on it as a purely alternative contract, which would be satisfied by the performance of one thing or the other. It seems to me that the proper way of declaring would have been to declare upon the contract as one to return the bills, and if not pay the amount, and accordingly to have shaped the breach as for non-payment of the amount, alleging that the bills had not been returned. I look at the contract as a mercantile contract made between mercantile men, and it does certainly seem to me that the meaning contended for by the defendant makes it one which it is scarcely likely that mercantile men would enter into. The plaintiff is sending out his goods, and entrusts a correspondent with the drafts which he has drawn against them. It is not an unreasonable stipulation to make, that, if not accepted or dishonoured, the defendant must return them to the plaintiff that he may deal with them as he pleases, or, if he does not so return them, must stand paymaster himself. It appears to me that, looking to the declaration, that was probably what the parties did intend. If so, is there any insuperable obstacle, from the form of the breach, to our giving effect to the construction at which we are disposed to arrive as to

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the contract? I agree that the breach must be construed with relation to the construction to be put on the contract in the declaration. On the whole, therefore, I think that the rule should be made absolute, though I am not without considerable doubts on the subject, which are very materially strengthened by the fact that my Lord differs.

BOVILL, C.J. I unfortunately differ from the rest of the Court. The question appears to me to be one of great difficulty, and my mind has fluctuated considerably during the course of the argument. The majority of the Court have arrived at a conclusion favorable to the plaintiff; but the inclination of my mind is in favour of the defendant. The matter is one of considerable doubt, and I need hardly say that I have some misgivings as to the correctness of my opinion, seeing that the rest of the Court are of a contrary opinion. The question, as it seems to me, turns entirely on the construction of the language in which the contract is alleged in the declaration. If the contract as there stated is simply in the alternative, to do one of two things, it would be satisfied by the performance of either, and the damages would be the loss occasioned by non-performance of that alternative which would be least beneficial to the plaintiff. If the true construction be that of the two things to be done one depended upon the non-performance of the other, that is, if the defendant did not return the bills, then he should pay the amount of them, the damages would be the non-payment of that amount. The rule of law is clear, that, in the case of alternative contracts, the person who has to perform the contract has the right to elect which branch of the alternative he will perform. On the other hand, it is equally clear, if the contract is to do a thing, and if not to pay a sum of money, then the damages for not doing the thing are the sum of money. Under which class does this contract range itself? It must depend on the language in which it is stated. I come to the conclusion that the contract stated in this declaration is one of the class which may be called strictly alternative, and would be satisfied by the performance of either branch of the alternative, at election. The rule as to this class of contracts is laid down by Maule, J., in *Cockburn v. Alexander*. (1)

(1) 6 C. B. 791, at p. 814; 18 L. J. (C.P.) 74.

Many instances might be put, e. g. the case suggested in argument. A man might contract that immediately after a race he would deliver over his horse Ajax, or pay 1000*l*. In that case the contract would be performed by either delivering the horse or the money, at election. There the effect of the alternative might vary according to circumstances, for, if the horse lost the race, the owner would probably desire to deliver the horse; but, if it won, he might prefer to part with the money. What would the damages be in such a case? They would, according to the rule laid down by Maule, J., be the loss occasioned by the non-performance of the contract to the plaintiff; and, if the contract could have been performed by the performance of the alternative least beneficial to the plaintiff, the measure of damages would be regulated by the loss occasioned by non-performance of that alternative. It may be said that the case I have put is like the present, and such a contract means that the owner is to deliver the horse, and if not to pay the 1000*l*.; but it seems to me that, if the terms of the contract are, as alleged in the declaration, in the alternative, by reason of the use of the disjunctive conjunction "or," we are not entitled to import into it the condition that if the one thing is not done the other shall be, which is to turn it from an alternative contract into one of another character. One test, which appears to me to be applicable, is to reverse the order in which the two alternatives are mentioned. Suppose the contract alleged were, to pay 1000*l*. or to deliver the horse. Clearly under such a contract there would be an option to do either, and it could not be said that it was a contract to pay the 1000*l*., or if not to deliver the horse. So also with the present contract, if it were alleged to be to pay the amount of the bills or to deliver them up. Could it then be said that it was anything but a purely alternative contract; that it was a contract to pay the amount, and if not to deliver up the bills, and that damages, perhaps exceeding the amount of the bills, might be recovered for the default in returning them? Here the jury have assessed the value of the bills at one farthing, but in some cases the actual damages for non-return of the bills might exceed the amount of them. In whatever order the two alternatives are put, it appears to me that, the disjunctive conjunction being used, the contract as alleged in the declaration gives an option which alternative

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the defendant will adopt. It seems to me that, to read the contract as suggested by my learned brethren, is to make a fresh contract for the purpose of giving effect to speculative views as to the intention of the parties, and to alter the natural signification of the language that is used. It is clear, on the face of the declaration, that the pleader treated this as an alternative contract, for the allegation of performance of conditions precedent is, that all things were done necessary to entitle the plaintiff, not to payment of the amount of the bills, but to the return of the bills or the payment of the amount of them. It may have been that it was with reference to this view of the declaration that the defendant allowed judgment to go by default. Under these circumstances, I think we ought to construe the declaration strictly, and are not entitled to substitute words which import a condition that one alternative shall be performed if the other is not, when, the disjunctive conjunction "or" being used, the natural meaning is a simple alternative. I have had considerable doubt on the matter, and regret to differ from my learned brethren, but I feel bound to express the opinion at which I have arrived. I am of opinion that this rule should be discharged.

Rule absolute.

Attorneys for plaintiff: *Poole & Hughes.*

Attorney for defendant: *Cotterill.*

June 7.

HUTCHINSON AND OTHERS v. TATHAM AND OTHERS.

Written Contract—Evidence of Trade Usage—Charterparty—Principal and Agent.

The defendants, acting as agents for one L., chartered a ship for the conveyance of a cargo of currants from the Ionian Islands. The charterparty was expressed to be made and was signed by the defendants, as "agents to merchants," the name of the principal not being disclosed:—

Held, on the authority of *Humfrey v. Dale* (E. B. & E. 1004; 27 L. J. (Q. B.) 390) and *Fleet v. Murton* (Law Rep. 7 Q. B. 126), that evidence was admissible, in an action by the shipowners against the defendants upon the charterparty, of a trade usage, by which, if the name of the principal is not disclosed within a reasonable time, the agents themselves are personally liable.

DECLARATION upon a charterparty, for freight and demurrage.

Plea, inter alia, denial of the making of the charterparty.

(1) 5c 4 June 1875. 218c 5d 1871

*CPD 102
 54 D 260
 74 BD 443*

On the trial before Keating, J., at the sittings in London after Hilary Term, the facts, so far as material, were as follows:

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The charterparty in question was expressed to be made between the plaintiffs and the defendants "as agents to merchants;" and provided that the ship should load at Patras, or at other places in the Ionian Islands, as ordered by the charterers, a full and complete cargo of currants, in usual packages, &c. The defendants' signature to the contract was expressed to be by them "as agents to merchants." It was proved that the defendants, in making the charterparty, had acted as agents for one Lyons, with due authority to do so; but evidence was tendered on the part of the plaintiffs, and admitted, of a trade usage, that, if the principal's name is not disclosed within a reasonable time after the signing of the charterparty, in such case the broker shall be personally liable. The jury, upon the evidence, found that such a custom existed, and that the name of the principal had not in this case been disclosed within a reasonable time. The verdict was entered for the plaintiffs for 475*l.*, leave being reserved to the defendants to move to enter a verdict for themselves on the ground that they had contracted as agents, and that parol evidence was inadmissible.

A rule nisi had been accordingly obtained, against which

H. James, Q.C., and *Philbrick*, shewed cause. They contended that the evidence was admissible, and that the case was substantially undistinguishable from *Dale v. Humfrey* (1) and *Fleet v. Murton*. (2)

[They cited *Noble v. Kennoway* (3), *Fairlie v. Fenton* (4), *Deslandes v. Gregory* (5), *Green v. Kopké* (6), Story on Agency, s. 267, and 2 Kent's Commentaries, p. 630.]

Day, Q.C., and *Lumley Smith*, supported the rule. They contended that the present case was distinguishable from *Dale v. Humfrey* (1) and *Fleet v. Murton* (2), inasmuch as the contract was made and signed by the defendants "as agents," and that evidence

(1) 7 E. & B. 266; E. B. & E. 1004; 26 L. J. (Q.B.) 137; 27 L. J. (Q.B.) 390. *4 Jur. 452, 5th 191*

(2) Law Rep. 7 Q. B. 126.

(3) 2 Doug. 510.

(4) Law Rep. 5 Ex. 169.

(5) 29 L. J. (Q.B.) 93; 30 L. J. (Q.B.) 36; 2 E. & E. 602. *6 Jur. 484, 651*

(6) 18 Q. B. 549; 25 L. J. (C.P.) 297. *2 Jur. 45, 1048*

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to make them liable as principals directly contradicted the terms of the contract, and was therefore inadmissible.

BOVILL, C.J. The evidence in this case shewed that the defendants were acting as agents for one Lyons, who, though usually residing at Patras, was at the time of the transaction in question in this country, and authorized the defendants to enter into the charterparty upon which the action is brought. I lay no stress, however, upon the principal being a foreigner, as it does not seem to me material in the present case. The contract is expressed to be made between the plaintiffs and the defendants as agents to merchants. The signature of the defendants repeats the same description of them, as agents to merchants. Apart from the evidence of custom, it is quite clear that upon a contract framed as this is the defendants could not be personally liable. It appears on the face of the contract that they are contracting on behalf of others. It is analogous to the case of a contract in which a broker says that he sells on account of somebody else as principal, and signs himself broker, which was the form of the contract in *Fleet v. Murton*. (1)

There is no distinction in principle, as it seems to me, between the contract in that case and the present. The contract in either case shews on the face of it that the party signing it is acting as agent. This was the view taken by Blackburn, J., in *Fleet v. Murton* (1), when he says, "I take it that there is no doubt at all on principle that a broker, as such, merely dealing as broker and not as purchaser of the article, makes a contract from the very nature of things between the buyer and seller, and he is not himself either buyer or seller; and that, consequently, when the contract, as in the present case, in terms says, 'sold to A. B.,' or 'sold to my principals,' and the broker signs himself simply as broker, he does not make himself by that either purchaser or seller of the goods. He is simply the broker making the contract."

The same point was decided in *Fairlie v. Fenton* (2), where Kelly, C.B., says, "When he contracts in the ordinary form, describing and signing himself as broker, and naming his principal, no action is maintainable by him." Martin, B., also says, in the

(1) Law Rep. 7 Q. B. 126.

(2) Law Rep. 5 Ex. 169.

same case, "When he states on the face of the contract that he is acting as broker, that is, as a middleman between the two parties, he has no interest, and cannot sue. If he could sue he could also be sued; and it is obvious on the face of the contract that he does not contract to deliver the goods sold, but only that he has authority to enter into the contract on behalf of the principals he names." On these authorities, and according to the general understanding in mercantile matters of the effect of a contract so framed, it seems to me that on the contract, apart from custom, the defendants are not responsible.

The question therefore arises, whether evidence is admissible to add a term not expressed in the contract, to the effect that, if the principal be not disclosed within a reasonable time from the signing of the contract, then the agent is to be personally liable. It is the general rule that evidence is admissible for the purpose of explaining the terms of a contract with reference to the usage of a particular trade, and of shewing that a term which, *primâ facie*, would have one meaning, may have in such trade another well-understood meaning. The question sometimes arises as to the meaning of a particular expression, but it also often arises as to whether, on a contract which purports to be made by a party only as agent, he can be charged as principal. Within my experience the question has arisen whether such a custom exists in many of the trades in London. In *Humfrey v. Dale* (1) the contract was, as it seems to me, substantially the same as this. There the contract was made by the defendants *primâ facie* as agents, but it was decided that evidence of custom was admissible to shew that it was intended that the agent should himself be bound if the principal's name were not declared. There is nothing unreasonable in such a custom, and I have known it applied by the findings of juries to many branches of trade. There is a good reason for such a custom. With respect to many branches of trade of a speculative character, where contracts are made through a broker to take advantage of the rise and fall of the markets, it may be all important that the names of the real principals should not be disclosed. In such cases, if the opposite party cannot obtain the name of the principal, no one can be responsible

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(1) 7 E. & B. 266; E. B. & E. 1004.

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to him but the broker. If the custom does exist, its only effect is to add a term to the contract, and to make the contract, which, *primâ facie*, is that of the principal, likewise bind the agent personally in a particular event.

After the cases of *Humfrey v. Dale* (1) and *Fleet v. Murton* (2), it seems to me impossible to contend that this evidence is inadmissible. In *Fleet v. Murton* (2) Cockburn, C.J., says, "For, although where a party contracts as agent there would not, independently of some further bargain, be any liability on him as principal, yet, if a man, though professing on the face of the contract to act as agent to another, and to bind his principal only and not himself, chooses to qualify the contract by saying that he will make himself liable, though he is contracting for another and giving to another rights under the contract, he himself will incur the same liability as his principal. Now, although, where a party professes to contract as broker, it might, *primâ facie*, be taken that he contracts without the intention of incurring liability on his own part, yet, if by the custom of the particular trade there is that qualification of the contract, which, if written into the contract in extenso, would undoubtedly bind him, that qualification may, I think, be imported into the contract by evidence of the custom."

In this reasoning I entirely concur. Blackburn, J., also says: "I agree that, in the present case, if it were not for the evidence of custom, the defendants, who contract for a principal, 'sold to a principal,' and sign as brokers, would not have been liable at all upon this contract. But then there came the custom, and the evidence of the custom was to this effect, that in this trade the brokers deal on these terms. The custom is this, if the broker does not disclose his principal's name on the contract, he is personally liable."

These are distinct authorities on the question; and, speaking from some experience, I should say it was the common practice to admit such evidence in cases of the sort. For these reasons, I think the rule must be discharged.

BRETT, J. The question here is as to the meaning of a written document, and as to whether parol evidence was admissible for the purpose of qualifying it. I have had very considerable doubt as

(1) 7 E. & B. 266: E. B. & E. 1004.

(2) Law Rep. 7 Q. B. 126.

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to what is the effect of this document with respect to the admissibility of the parol evidence.

In the body of the contract it is stated that it is made by the defendants as agents to merchants, and the signature is to the same effect. This appears to me a much stronger case than *Humfrey v. Dale* (1) and *Fleet v. Murton*. (2)

It does seem a strong thing, when a person expressly says to another, in a written document, that he is not contracting with him as principal, and in signing that writing states the same thing again, to hold that it can by any evidence afterwards be established that he is liable, not as agent but principal. On the authority of what was said by Cockburn, C.J., in *Fleet v. Murton* (2), and Hill, J., in *Deslandes v. Gregory* (3), it is clear that without evidence of custom the defendants would not be liable as principals. So strong do I consider the terms of this contract in this respect, taking the terms in the body and the signature together, that, were evidence offered to shew that from the beginning the defendants were liable as principals, I should be prepared not to admit it; but the cases have lately gone very far as to the admissibility of evidence of custom. It is clear, however, that no such evidence can be admitted to contradict the plain terms of a document. If evidence were tendered to prove a custom that the defendants should be liable as principals under all circumstances, that would contradict the document; but it has been decided that, though you cannot contradict a written document by evidence of custom, you may add a term not inconsistent with any term of the contract. What, I apprehend, it is here attempted to add, is, not that the defendants would be liable as principals in the first instance or under all circumstances, but that, though *primâ facie* and in most cases the brokers are mere agents, yet, if they fail to disclose the name of the principals within a reasonable time, they, the agents, may, on the happening of this contingency, be principals. This is not, I think, on the whole, inconsistent with the contract, and therefore, though with some doubt, I think the evidence was admissible, and the rule must be discharged.

GROVE, J. I cannot see that there is any tangible distinction

(1) 7 E. & B. 266; E. B. & E. 1004. *4 Jan. H. L. 21. 8. 191*
 (2) Law Rep. 7 Q. B. 126.
 (3) 2 E. & E. 602, 607.

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between the contracts in the cases of *Humfrey v. Dale* (1) and *Fleet v. Murton* (2) and that in the present case. In the present case the defendants say they contract as agents; but in those cases it was obvious, on the face of the documents, that the defendants were agents. In both the contract was expressed to be made for a principal, and the broker signed himself broker. In what capacity, therefore, could he contract except as agent? If this view be correct, these cases are express authorities, one of them being the decision of a court of error, that the evidence of the custom is admissible in such a case as the present. It is not easy to define exactly the limits within which evidence of mercantile custom is admissible to vary the meaning of a written contract. It is clear that evidence is not admissible to contradict the writing; but in one sense the contract must always be varied by the admission of the evidence of custom, inasmuch as the effect of the contract would not be the same without the parol evidence, or else the parol evidence would itself be unnecessary. The evidence of custom that is inadmissible must be, it appears to me, evidence of something inconsistent and irreconcilable with the written contract. The evidence here proposed to be given can only be inadmissible if the import of the words "as agents" is such as to exclude a collateral provision for liability as principals in a certain contingency. It is not attempted to shew that the defendants' principals would not, *primâ facie*, and, in most cases, be liable as the principals, and not the defendants; but that, in a certain particular contingency, the defendants might themselves be personally liable. This does not seem to me so inconsistent and irreconcilable with the contract as to amount to a contradiction or variation beyond what is admissible.

KEATING, J. I also think that this evidence was admissible. I agree with my Brother Brett that the present case goes somewhat beyond any case yet decided, but still I think that it is fairly within the authority of *Humfrey v. Dale* (1) and *Fleet v. Murton*. (2)

Rule discharged.

Attorneys for plaintiffs: *Lowless, Nelson, & Jones.*

Attorney for defendants: *Cooper.*

(1) E. B. & E. 1004.

(2) Law Rep. 7 Q. B. 126.

5 Feb. 1874

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June 10.

Ballot Act, 1872 (35 & 36 Vict. c. 33)—Municipal Election—Duties of Presiding Officer—Action for Breach of ministerial Duty—Voting Papers without the Official Mark.

The Ballot Act, 1872, by implication, imposes a duty *primâ facie* on the presiding officer at a polling station during an election to deliver to the voters voting papers bearing the official mark appointed under the Act for the election, and to be present during such election at the polling station, so that the voters, before depositing their voting-papers in the ballot box, can shew to him the official mark on the back of such papers in accordance with the statute.

For breach of these duties, being merely ministerial, an action will lie by a party aggrieved, e.g., who has thereby lost the election through votes given to him being void for want of the official mark, without malice or want of reasonable care on the part of the defendant.

If a clerk be appointed by the returning officer to assist at the polling-station, the presiding officer may by the Act depute to such clerk so much of his duties as he thinks fit, with certain specified exceptions. For the acts of commission or omission of the clerk in the performance of the duties so delegated, the presiding officer will not be responsible, inasmuch as he does not appoint the clerk, and the relation of master and servant does not exist between them.

Per Bovill, C.J., and Grove, J. The Act does not impose on the presiding officer the duty of ascertaining before the voter deposits a voting paper in the ballot box, whether the official mark is on such paper.

Per Keating and Brett, JJ., the statute does impose such duty on the presiding officer.

DECLARATION: First count. That, before and at the time of the committing of the grievances hereinafter mentioned, a certain election was being held for the election of a councillor to serve in the town council of the borough of Birmingham, for a certain ward in the said borough called St. Martin's ward, and the defendant had been appointed, under and by virtue of the rules contained in the 1st schedule to the Ballot Act, 1872, a presiding officer to preside at one of the polling stations appointed for the said election, and the defendant acted as such presiding officer at the said polling station at and during the said election, and the plaintiff and one Thomas Startin were respectively candidates at the said election for the said office of town councillor; and it became and was the duty of the defendant at such election to deliver to the voters voting at the said polling-station ballot papers bearing the official mark appointed for the said election; and it was

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also the duty of the defendant to ascertain, before the voters placed their said respective ballot papers in the ballot box, whether the said ballot papers were properly marked with the official mark as aforesaid; and the defendant undertook and entered upon the said respective duties, for performance of which duties aforesaid the defendant received reward, and the defendant as such presiding officer as aforesaid neglected his said duties as follows, that is to say, that he delivered to certain of the said voters at the said polling station ballot papers not bearing the said official mark, and which last-mentioned ballot papers, after having been duly marked and folded by the said respective voters, were placed by the respective voters in the said box, and the defendant did not ascertain that the said last-mentioned ballot papers did not bear the said official mark before the same were placed in the said box as aforesaid: and the plaintiff avers that after the close of the polling at the said election the said Thomas Startin was declared to be elected by a majority of three votes; and the plaintiff afterwards petitioned against the return of the said Thomas Startin, under the Corrupt Practices (Municipal Elections) Act, 1872, and the said petition came on for hearing before G. M. Dowdeswell, Esq., one of Her Majesty's counsel, and, after hearing the evidence and examining the ballot papers and other documents produced before him, the said G. M. Dowdeswell, Esq., determined that from the number of votes polled in favour of the plaintiff twelve of such votes should be struck off, to wit, two of such votes on the ground that the two persons who gave such votes had personated certain persons entitled to such votes, nine of such votes on the ground that ballot papers used in giving those votes, did not bear the said official mark, and one of such votes on the ground that the voter had, contrary to the provisions of the said Ballot Act, 1872, so marked the said ballot paper used by him in giving such vote that such vote could be identified; and the said G. M. Dowdeswell, Esq., further determined that, from the number of votes given for the said Thomas Startin, fourteen of such votes should be struck off, to wit, three of such votes on the ground that the voters who gave such votes were during the said election paid canvassers of the said Thomas Startin, ten of such votes on the ground that the ten persons who gave such votes had personated

certain persons entitled to such votes, and one of such votes on the ground that the ballot paper used in giving the said vote did not bear the said official mark, and that two votes which had been rejected by the returning officer at the said election should be added to the number of votes polled in favour of the said Thomas Startin; and in the result the said G. M. Dowdeswell, Esq., certified that the said Thomas Startin was duly elected and returned to serve as such town councillor as aforesaid; and by reason of the neglect of the respective duties by the defendant committed as hereinbefore mentioned, the plaintiff was prevented from being elected and serving as such town councillor as aforesaid, and lost all the costs and expenses he was put to in endeavouring to procure his said election as aforesaid and in presenting the said petition, and has been and is otherwise damnified.

Second count, after repeating the preliminary allegations in the first count contained, stated that the defendant became and was bound by the provisions of the Ballot Act, 1872, at and during such election, to be present at the said polling station, so that each voter, before the placing the ballot paper by which he voted in the ballot box at the said polling station, could shew to the defendant, as such presiding officer as aforesaid, the official mark appointed for the said election at the back of the said ballot paper; and the defendant neglected his duty in this, that he was not present so that nine of the said voters who voted for the plaintiff during the said election at the said polling station could shew him the official mark on the back of the voting paper; that the said nine voters so last mentioned received ballot papers not having the official marks aforesaid, and after having duly marked and filled in the same, placed the same in the said box; and that after the close of the polling at the said election the said Thomas Startin was declared to be elected by a majority of three votes. [The count then concluded with allegations substantially similar to those in the first count.]

Third count, after repeating the same preliminary allegations as in the first and second counts, stated that the defendant wilfully omitted to mark a certain number of the ballot papers on each side immediately before the same were delivered to and used by the voters, and also wilfully omitted to be present so that each of the

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said voters could shew him the said official mark on the back of the said ballot-paper before each of the said voters placed his vote in the closed box used for the aforesaid purpose; and also wilfully omitted to ascertain whether each of the said ballot papers, before the voter placed the same in the said closed box, was marked on the back with the official mark; and by reason of the premises, upon a petition to quash the return of the said Thomas Startin, the said votes so given as aforesaid for the plaintiff were disallowed, and thereby the plaintiff lost the said petition, and was not declared to be duly elected, as he would have been but for the omission in this count alleged; and the plaintiff has lost the costs and expenses he incurred in endeavouring to procure his election, and was put to great costs and expenses in and about the said election petition, and has been and is otherwise damnified; and the plaintiff is entitled to the sum of 100*l.* for the wilful omission hereinbefore mentioned.

Demurrers to all the counts.

Holl, for the defendant. The statute casts no such duties as those alleged in the declaration upon the defendant, at any rate not in the sense that an action will lie for the breach of them. The provisions are directory only. The 11th section is strong to shew that only a wilful breach of these duties can give a right of action. The words in that section, which reserve other liabilities, refer only to liabilities for wilful breaches of duty. The Act, therefore, which creates the duties expressly gives an action for wilful breaches of them; and the inference is that there is no right of action intended to be created in respect of any other breaches of them.

Secondly: If an action will lie at all for the breach of those duties, it will not lie without an allegation of malice, or at least want of reasonable care and diligence. The greatest hardships and inconveniences would arise if it were otherwise. The most multifarious duties are cast on the presiding officer, which have to be many of them attended to simultaneously in the midst of the bustle of an election; and without any real negligence it may happen by accident, e.g. through the stamping machine not working properly, that some papers among a number may not be

effectually marked with the official mark, and then, if they are delivered out without this being noticed, it is alleged that the presiding officer will be subject to a multiplicity of actions by each of the voters whose votes were rejected, and by the candidate.

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Thirdly: There is nothing in the Act which throws these duties on the presiding officer personally. His duty is to preside over the election at the polling station; but by the Act the returning officer may appoint a clerk or clerks to assist the presiding officer, to whom the latter may depute such of his duties as he thinks fit; and the clerk would be the person to perform such duties as delivering the papers to the voters, and seeing generally that the statute is complied with in matters of detail. The relation of master and servant does not exist between the presiding officer and the clerk, so the former cannot be responsible for the act of the latter.

[KEATING, J. But the presiding officer may perform any of the duties himself. There may be no clerk, or the presiding officer may not have deputed the particular duty to him.]

The allegations in the declaration are not sufficient to shew that he personally undertook the particular duties in question. The allegation amounts to no more than that he undertook the duties of presiding officer generally. It is quite consistent with the declaration that clerks were appointed, who really acted in doing the duties alleged.

Fourthly: There is no sufficient allegation in any of the counts to shew that the loss of the election was the consequence of the breaches of duty complained of. The allegations with reference to what took place on the petition do not identify the votes struck off from the plaintiff's votes with the voters to whom the voting papers were delivered by the defendant without official marks. It is quite consistent with the statements in the declaration that the votes struck off were votes given at another polling station. There is no allegation that the voters who received such papers from defendant voted for the plaintiff. It is not alleged that, with respect to the votes which were struck off on the ground of the papers not having the official mark, the papers had not in fact the official mark. In an action of this kind, the declaration ought certainly not to receive an indulgent construction. The general allegations at

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the end of the counts, stating that the plaintiff was prevented from being elected, cannot cure the defects of the previous allegations, inasmuch as they must be construed as a mere conclusion from what has gone before, and not as a substantive allegation of fact which would be traversable. (1)

[He cited *Couch v. Steel* (2); *Schinotti v. Bumsted* (3); *Ashby v. White* (4); *Tozer v. Child* (5); *Harman v. Tappenden*. (6)]

Henry James, Q.C. (*Tindal Atkinson* with him), for the plaintiff. It is manifest that the statute imposes the duties alleged on some one, and, though they may be deputed to clerks, *primâ facie* they are imposed on the presiding officer. The declaration alleges that he undertook them, and, if in fact they had been deputed to a clerk, that fact may be alleged by way of plea in answer by the defendant. There need be no hardship or inconvenience. The local authority may regulate the number to poll at each station, and sufficient assistance may be provided, so that the requirements of the Act may be easily carried out. The presiding officer is paid for the performance of his duties, and need not accept the office unless he chooses.

These provisions cannot be construed as directory merely, for they are essential to the working of the Act. The votes are void unless given on papers bearing the official mark. So also with regard to the deposit in the box of the voting paper bearing the official mark; if one of the papers bearing the official mark be got out of the polling station, a series of substitutions may be made, each voter taking in a voting paper already filled up, bearing the official mark and bringing out the one given to him. Therefore these are duties not merely directory but absolutely imposed on the presiding officer by the Act; and, such duties being of a minis-

(1) In the course of the argument both the defendant's and plaintiff's counsel went through the provisions of the sections of the Act in detail with regard to each of the three duties alleged, with a view to shewing respectively that they were not and were imposed on the presiding officer; but the sections are so fully discussed in the judgment that it has not been

thought necessary to give the argument in detail.

(2) 3 E. & B. 402; 23 L. J. (Q.B.) 121. *1873 5 B. 121*

(3) 6 T. R. 646.

(4) 1 Sm. L. C. 227; 2 Ld. Raym. 938.

(5) 7 E. & B. 377; 26 L. J. (Q.B.) 151. *2 Ex. 25. 928*

(6) 1 East, 555, 564.

terial character, the general rule of law is that for breach of such duties an action will lie by a party aggrieved, without an allegation of malice or negligence. *Miller v. Seare* (1); *Shinotti v. Bumsted* (2); *Starling v. Turner* (3); *Tozer v. Child* (4); *Atkinson v. Newcastle, &c., Waterworks Co.* (5); *Barry v. Arnaud* (6); *Cullen v. Morris.* (7) What authority is there for saying that in the case of a ministerial duty directed by an Act of Parliament an action will not lie unless there has been want of reasonable care?

It is alleged that it is the duty of the voter to see that the mark is on his paper; but that cannot be, because by the provisions of the Act the mark is to be kept secret, and therefore the voter, not knowing what the mark is, cannot know whether it is on the paper or not.

The 11th section, by which the penalty is given for wilful breach of duty, reserves all other penalties and liabilities, and therefore can have no effect with respect to the question whether an action will lie or not. With respect to the plaintiff's right to sue as a party aggrieved, it is submitted that, even if the previous allegations as to what took place on the petition are insufficient, the general allegation at the end of each of the counts is sufficient. It cannot be looked upon as a conclusion of law, but must be treated as an allegation of fact.

Holl, in reply, cited *Bullen on Pleading* (8); *Hartley v. Her-ring.* (9)

BOVILL, C.J. This case raises important questions upon the construction of the Ballot Act, 1872, with regard to the duties of presiding officers and clerks at parliamentary and municipal elections. The present case is one of a municipal election; but the provisions of the Act which are involved are many of them applicable to parliamentary elections also, and therefore the questions which arise with respect to the breach of duties imposed by the Act assume a very serious character. The 5th section of the Act

(1) 2 W. Bl. 1141.

(2) 6 T. R. 646.

(3) 2 Lev. 50; 2 Vent. 25.

(4) 7 E. & B. 377; 26 L. J. (Q. B.)

(5) Law Rep. 6 Ex. 404.

(6) 10 Ad. & E. 646.

(7) 2 Stark. 577.

(8) 3rd ed. p. 12.

(9) 8 T. R. 130.

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provides for the division of counties and boroughs into polling districts by the local authority, and for the assignment of a polling place to each district. The 15th rule in the 1st schedule provides that at every polling place the returning officer shall provide a sufficient number of polling stations. The 16th rule then provides that each polling station shall be furnished with compartments, in which the voters can mark their votes, screened from observation ; and by the 20th rule the returning officer is to provide each polling station with materials for voters to mark the ballot papers, with instruments for stamping thereon the official mark, and copies of the register ; and it is likewise enacted that he shall keep the official mark secret. The 21st rule is that which provides for the appointment of the presiding officer, for breaches of duties connected with whose office the defendant is now sought to be made liable. That rule enacts that the returning officer shall appoint a presiding officer to preside at each station, and that the officer so appointed shall keep order at his station, shall regulate the number of electors to be admitted at a time, and shall exclude all other persons except the clerks, the agents of the candidates, and the constables on duty. The general duties of the presiding officers are also referred to by ss. 9 and 10 of the Act. Sect. 9 gives him various powers for the preservation of order, and s. 10 other powers for the purpose of adjournment of the polls and administering questions to the voters.

The 8th section, after providing that the returning officer shall provide nomination papers, polling stations, ballot boxes, ballot papers, stamping instruments, &c., provides that he may appoint and pay such officers as may be necessary for effectually conducting an election in manner provided by the Act. Then if, in addition to a presiding officer, the returning officer appoint a clerk or clerks to assist him, the 50th rule in the 1st schedule provides that the presiding officer may do, by the clerks appointed to assist, any acts which he is required or authorized to do by this Act at a polling station, except ordering the arrest, exclusion, or ejection from the polling station of any person. The machinery being thus provided, we have now to look to the course of proceeding at the poll, and for that purpose reference must be made to the 2nd section of the Act. That section enacts as follows : " In

the case of a poll at an election, the votes shall be given by ballot. The ballot of each voter shall consist of a paper, in this Act called a ballot paper, shewing the names and description of the candidates. Each ballot paper shall have a number printed on the back, and shall have attached a counterfoil, with the same number printed on the face. At the time of the voting the ballot paper shall be marked on both sides with an official mark and delivered to the voter within the polling station, and the number of such voter on the register of voters shall be marked on the counterfoil, and the voter, having secretly marked his vote on the paper and folded it up so as to conceal his vote, shall place it in a closed box in the presence of the officer presiding at the polling station (in this Act called the presiding officer), after having shewn to him the official mark at the back." Any ballot paper which has not on its back the official mark, &c., is to be void and not counted. The rules relating to this subject are the 24th and following rules. The 24th rule provides that immediately before a ballot paper is delivered to the elector it shall be marked on both sides with the official mark, either stamped or perforated, and the number, name, and description of the elector, as stated in the copy of the register, shall be called out, and the number of such elector shall be marked on the counterfoil, and a mark shall be placed in the register against the number of the elector, to denote that he has received a ballot paper, but without shewing the particular ballot paper which he has received. The 25th rule provides that the elector, on receiving the ballot paper, shall forthwith proceed into one of the compartments in the polling station, and there mark his paper and fold it up, so as to conceal his vote, and shall then put his ballot paper so folded up into the ballot box; that he shall vote without undue delay, and shall quit the polling station as soon as he has put his ballot paper into the ballot box. The 26th rule provides for voters incapacitated by blindness, and certain other peculiar cases. It is then necessary to refer to the directions for the guidance of voters at the end of the second schedule, which are to be printed in conspicuous characters and placarded at the polling stations. They provide that the voter shall go into one of the compartments and place a cross opposite the name of the candidate for whom he votes, and proceed thus: "The voter will then fold

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up the ballot paper, so as to shew the official mark on the back, and, leaving the compartment, will, without shewing the front of the paper to any person, shew the official mark on the back to the presiding officer, and then, in the presence of the presiding officer, put the paper into the ballot box, and forthwith quit the polling station." The only other section to which it will be necessary to refer is the 11th section, which enacts that "every returning officer, presiding officer, and clerk, who is guilty of any wilful misfeasance, or of any wilful act or omission in contravention of this Act, shall, in addition to any other penalty or liability to which he may be subject, forfeit to every person aggrieved by such misfeasance, act, or omission, a penal sum not exceeding one hundred pounds."

In this case there are three allegations of duty upon which the plaintiff seeks to maintain this action. The first allegation is, that it was the duty of the defendant, as presiding officer, to mark the ballot paper with the official mark, or rather, to deliver to the voter a ballot paper bearing such mark. The allegation which I will deal with secondly, though it does not come in that order in the counts, is, that it was the duty of the defendant to be present at the polling station, so that each voter, before placing the ballot paper in the box, could shew to the presiding officer the official mark on the back of the ballot paper. Thirdly, it is alleged that it is the duty of the presiding officer to ascertain, before the voting paper is placed in the box, that it is properly marked with the official mark. There are no clauses in the Act, the rules, or the directions, that expressly impose any of these duties on the presiding officer. I am, however, of opinion, looking to the provisions of the Act, that there is clearly a duty cast on some person to deliver to the voters ballot papers with the official mark properly stamped upon them. It is provided that an instrument shall be procured for the purpose of stamping them; and there must be some one to use it. Some stress was laid on the provision that the mark was to be kept secret, and it will be as well to deal with this point at once. It is to be secret in the sense that no opportunity is to be given for imitating it; but it cannot be intended to be so secret as that the voter may not know and recognise it. It does not follow from that that he would be able to carry it away or copy it for the purposes

of forgery. The mark being placed on both sides of the paper, the voter, on being handed the paper, will necessarily be able to see what it is; and the Act and the directions to the voter expressly direct that the voter shall shew the mark on the back to the presiding officer before placing the paper in the box. Now, the Act providing that the paper shall be delivered to the voter at the polling station, having the official mark, and that the voter shall fill up the paper in a particular manner, and before depositing it in the box shall shew the mark on the back, who is the person that is to see that these directions are carried out? The presiding officer is the person who is to preserve order, and generally to attend to what is necessary at the polling station. There may be various officers provided according to the Act. In small districts, perhaps, the presiding officer alone will suffice; but in populous districts it would be impossible for the presiding officer by himself to do all that is necessary at an election. Provision is made for the appointment of clerks, and, as a general rule, one would expect that in such districts there would be several clerks to attend to the various practical details, to refer to the register, fill up the counter-foils, stamp the papers, &c., and that the presiding officer would exercise a general supervision, and only interfere in cases of any difficulty or disturbance. Now, the duty must lie on some one to deliver the papers bearing the official mark. It appears to me that the question on whom it would lie depends on the question to whom it was in point of fact intrusted. The presiding officer might undertake it himself, or he might depute it to a clerk under the provisions of the 50th rule; but that one or other must do it seems to me clear. The conclusion at which I have arrived, after the able argument on the subject, is, that the duty of delivering the paper with the official mark upon it must rest with the person who undertakes that part of the duties connected with the election at the polling station; and I mean by that, not the person who generally undertakes that duty, but the person who in each particular instance undertakes it, and consequently that the responsibility would rest on the presiding officer or the clerk, according as the one or the other did in point of fact deliver out the paper. With reference to acts done by the clerk, the performance of which had been deputed to him by the presiding officer, it must be observed

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that the clerk is appointed and paid by the returning officer, not by the presiding officer; the relation of master and servant does not exist between the presiding officer and the clerk; each is an independent officer, though the powers of the presiding officer are larger. It seems to me, therefore, that the presiding officer is not responsible for the act of the clerk in delivering out a paper not marked with the official mark. The clerk would be the person on whom the responsibility would devolve, by reason of his having undertaken the duty quoad the particular voter. If, on the other hand, the presiding officer undertook the duty by himself, delivering the paper to the particular voter, he would be bound to see that the paper was duly stamped. The question of responsibility must, as it seems to me, depend on the question who personally delivered the paper. The next question is, how far the presiding officer was bound to be present at the polling station, so that each voter, before placing his ballot paper in the box, might shew the official mark on the back to the presiding officer, in accordance with the statute. It is obvious that there must be some one bound to be present for the purpose, if the Act is to be complied with. It appears to me that the duty may rest on the presiding officer himself, or, in large and populous districts, where there might be great pressure during certain hours, as at meal hours in a working-class constituency, and it would be impossible practically for one man to attend to all that was necessary, this also, in my opinion, is one of the things which would seem to be within the 50th rule, and which might be deputed to clerks. In practice I have little doubt that in populous places that is the course adopted. The presiding officer would hand the voting papers to different clerks, probably assigning to each clerk a particular portion of the alphabet, and the clerks would hand them out to the voters, and when the voters had filled them up they would be required to place them in the ballot box before the clerk, and the voter would then exhibit the mark on the back of the paper to the clerk presiding over the ballot box in which he deposited it. I see no objection to that course, and I do not see how the matter could be managed otherwise in practice. Then, the same rule appears to apply to this duty as to the duty first alleged. The duty would seem to rest on the person who undertakes to perform it in the particular case.

" The next allegation of duty is with reference to ascertaining before the paper is placed in the box whether it is properly marked with the official mark. I do not find any clause in the Act of Parliament or the rules which would lead one to the conclusion that any positive or imperative duty is imposed on the presiding officer or the clerk with regard to that. The duty is cast on the voter of shewing the mark. That appears from the latter part of the 2nd section, and also from the directions to voters in the 2nd schedule. To deal with the matter from a practical point of view, the voter may go into the compartment and mark the paper, and then, if he chooses to go and put it into the box without shewing the official mark, although it is clearly made his duty to do so, what power has the officer or the clerk to prevent him, to take away the paper from him, or to touch it any way? I do not see how we can imply any power to interfere to such an extent with the voter in the exercise of his right to vote, without an express provision to that effect. The provisions of the Act with reference to shewing the mark, and the directions to the voter, refer to what is to be done by the voter, and do not point to any act to be done by the presiding officer. On the whole, therefore, I come to the conclusion that no duty is cast upon the presiding officer to ascertain whether the paper is marked before it is placed in the box.

These, then, are the three matters in respect of which a duty is alleged to be imposed on the defendant. It is necessary then for the plaintiff to shew that the duties in question imposed by the Act did fall in this particular instance on the defendant. For that purpose it is necessary for him to allege that the defendant did, as presiding officer, personally undertake the performance of such duties. That is to say, that he did personally deliver to the voters the voting papers, and that he neglected to see that such papers bore the official mark, and that he personally was the officer who undertook to be present in order that the official mark might be shewn to him, and that these duties did not devolve on a clerk.

With regard to the allegations to that effect, I think that the first count sufficiently alleges that the defendant was the presiding officer, and did act in this particular instance in the matter of delivering the papers to the voters. So also the allegations in the

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second count of a similar character appear to me to be sufficient. There are statements that he was presiding officer, and acted as such, sufficient to imply that he was presiding and acting with reference to the matters complained of, and that, in the absence of any statement on the record with regard to the existence of any clerks, he was the person bound to be present in order that the voters might exhibit the official mark on the back of the paper to him.

The question remains, whether there is a sufficient allegation that the plaintiff is a person injured by the breaches of duty complained of to enable him to maintain the action. It seems to me that the first count is greatly defective in this respect, and could not be supported, even after verdict. There is an entire absence of any sufficient statement to connect the voters to whom the defendant delivered the unmarked papers with the votes struck off by the barrister, or that the majority, as a matter of fact, was changed or the result of the election affected by the delivery of the unmarked papers. And, further, it is not stated that the voters to whom the papers were so delivered voted for the plaintiff. These insufficient allegations of fact are followed by a general allegation that by reason thereof the plaintiff was prevented from succeeding on the election.

It has always been a well-settled rule of pleading that a mere allegation of duty is an allegation of a conclusion of law, and, if the facts stated are such as not to raise the alleged duty, the mere general allegation of duty cannot avail. According to the old language of pleading, a *virtute ejus* cannot be traversed. It appears to me that the general allegation in this declaration is a mere statement of a conclusion arising from the facts that are previously mentioned, and cannot cure the preceding defective statement. I do not look at it as an allegation of fact, or one that would be traversable. Therefore it seems to me that the first count is good so far as one of the allegations of duty and the breach of such duty are concerned, but bad, inasmuch as it does not sufficiently shew that the plaintiff is a person injured by the breach of duty; and that our judgment ought to be for the defendant on that count.

With regard to the second count, it seems to me that the same objection applies as to the first count. With regard to the third

count, it seems to me that the case is brought within the 11th section. The allegations in that count with respect to the injury caused to the plaintiff by reason of the defendant's breach of duty, though not very artistically framed from a technical point of view, seem to me substantially sufficient to shew that votes were given for the plaintiff which were disallowed by reason of defendant's breach of duty, and that the plaintiff thereby lost the election; and therefore the count seems to me sufficient in point of law, except, however, with respect to the allegation of a duty to ascertain that the papers were marked with the official mark before being deposited in the box.

It was urged, with respect to the first and second counts, that the 11th section shewed that they were not sustainable, and that the only liability which could arise for a breach of the duties alleged was the liability to a penalty under that section. It appears to me that this argument is not well founded, because the section provides that the penalty shall be in addition to any other liability. If there be these duties of delivering papers marked with the official mark and of being present that the voter may shew the mark, then for the breach of them there would, apart from the 11th section, be a liability in addition to that provided for by the 11th section, and consequently by the very terms of that section it is not affected.

It was also urged, with respect to the first and second counts, that no action would lie for the breach of the duties alleged in them, even if such duties existed, unless the acts complained of were done maliciously or negligently. If there be a positive duty, as contended for, as I think there is with respect to two of the matters alleged, it is a ministerial duty, and it is not necessary that there should be malice or negligence. It would be superfluous to go through the cases on the subject. It is a general rule of law that, when a ministerial duty is imposed, an action lies for breach of it, without malice or negligence.

KEATING, J. This is an action against a presiding officer at a municipal election for the borough of Birmingham, in respect of certain breaches of duty alleged against him as such presiding

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officer. The breaches charged are, first, that he delivered ballot papers to voters which had not upon them the official mark; secondly, that he did not ascertain that the voting papers were stamped upon the voters' depositing them in the ballot box; and thirdly, that he was not present at the polling station, so that the voters could shew him the official mark on the ballot paper before placing it in the box. The first question is, whether the statute creates any duty on the part of the presiding officer, the breach of which would render him liable to an action such as is now sought to be maintained. It has been very forcibly contended by Mr. Holl, that it was not intended by the statute to create any duty on the part of the defendant, or, as I understood Mr. Holl, and indeed it is a necessary consequence of his argument, on the part of any person, to perform the matters specified in the Act, so as to create any liability to an action for breach of such duty. It seems to me that the statute does most clearly create a duty in some person to perform the acts thereby specified; and it would be a strange result if we were driven to such a construction of the Act as would render its provisions nugatory, and to say that the performance of all these duties, which are obviously more or less important and essential to the working of the Act, are left to the discretion of the parties employed to perform them. It is clear to me that the Act imposes a duty on some one. What then are the acts which by the statute are required to be performed? The scheme of the Act is, to introduce a system of secret voting. The voter is to apply for a balloting paper, and that paper is to be delivered to him, his number on the register being first ascertained, and the paper being marked on both sides with the official mark. It is obviously most important that the paper which is delivered out to the voter should be the same which he afterwards deposits in the box. Accordingly, the officer is required to stamp the paper on delivering it to the voter, and the voter, after going into the compartment and marking the paper secretly, is to fold up the paper, leaving the official mark on the back exposed, and, taking it in that state, is to shew the mark on the back to the officer, and deposit the paper in the box. The defendant occupied the position of presiding officer. The presiding officer is appointed by

the returning officer, and his duty is to preside at the polling station and to keep the ballot box in his view. It is clear that by the Act the returning officer can appoint such assistants as are necessary for the presiding officer in the shape of clerks, and that the presiding officer may delegate so much of his duties as he thinks fit to such clerks, with certain exceptions as to the maintenance of order. It might be doubtful, also, how far he could delegate the duty of presiding generally at the polling station, for that duty appears peculiarly appropriated to himself in person. These duties, then, appear to me to be clearly imposed on some one, and in my opinion *primâ facie* they are imposed on the presiding officer. I am by no means disposed to think that, if the presiding officer delegated the duty of delivering the voting papers to the clerk, as I think he might, and the clerk in fact delivered the papers without marks, and the presiding officer had not personally anything to do with such delivery, the presiding officer would be liable for it. I think, on the contrary, that the clerk would in that case be responsible. It is sufficient for the present purpose to say that the presiding officer is *primâ facie* the party liable. If he seeks to get rid of such liability, it is upon him to shew that he has delegated his duty to a clerk. I am therefore of opinion that *primâ facie* the first duty alleged in the declaration is cast on the defendant. The second duty alleged is to ascertain that the voting papers are marked with the official mark before they are placed in the box. In this point I unfortunately differ from my Lord in the view which I take of the Act. It seems to me that there is a duty imposed on the presiding officer in this respect by the statute. It may be urged that cases may occur in which the performance of such duty would be difficult,—that the voter may insist on depositing the paper in the box without shewing the mark, and that the presiding officer has no power to prevent him. The Act provides that the presiding officer shall have assistance in the shape of police constables, and that he may cause persons to be removed from the polling station who do not keep order, or who refuse to obey his lawful directions; and he is to keep the ballot box so as to be within his view. I see nothing unreasonable in imposing on him the duty of ascertaining whether the ballot paper

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about to be deposited in the box, has the official mark, which it is doubtless the duty of the voter to exhibit to him, under risk of losing his vote.

With respect to the third duty alleged, it seems to me that the statute *primâ facie* imposes upon the presiding officer the duty of being present at the polling station, in order that the voter may shew him the official mark upon the paper before depositing it in the box. One of the most important objects to be attained by the provisions of the Act is, to secure that the paper which is put in the ballot box is the paper which is delivered out marked with the official mark. It seems to me, therefore, that the duty is created by the statute, and *primâ facie* imposed on the presiding officer, of seeing that this object is carried out. Then, these duties being imposed by the statute, are there here such breaches of them as to subject the defendant to an action? It appears to me that these duties are purely ministerial, and therefore that this case is within the class of cases in which it has been held that, there being a breach of a duty purely ministerial, an action will lie without any allegation of malice. It has been contended that the 11th section shews the intention to have been, that the only remedy for a breach of duty should be by way of penalty. It seems to me clear that the remedy given by that section is merely cumulative, and it leaves any right of action at common law untouched.

The only remaining question is, whether the declaration discloses breaches of the statutory duties imposed on the defendant by which the plaintiff was injured. Here, again, I have the misfortune to differ from my Lord, and I need hardly say that on a point of pleading I differ from him with considerable diffidence. It seems to me that, assuming that the first count is open to many of the criticisms urged against it, it nevertheless sufficiently shews that the plaintiff was a party aggrieved by the breaches of duty therein complained of. I do not take the same view as my Lord of the concluding allegation. It seems to me that it is not, strictly speaking, a *virtute ejus*,—that it is not an allegation of a conclusion of law to be deduced from the preceding statements. If I thought it was, I should certainly agree with my Lord; but it certainly seems to me to be an allegation of fact, and traversable

as such. The same reasoning applies to the second count. There is likewise in that count a sufficient allegation of a duty, and a breach of such duty, whereby the plaintiff was aggrieved. With respect to the third count, I agree entirely with what my Lord has said. For these reasons, in my opinion, the plaintiff is entitled to our judgment.

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BRETT, J. One set of questions in this case depends upon the construction of the Act. The other set of questions depends upon the construction of the counts of the declaration. The former alone appear to be of general importance, and are the questions which the parties, I should expect, really wish decided; the latter can be of very little general importance. It would be prudent on the part of the plaintiff to obviate any difficulty with respect to them, by an amendment. With respect to the construction of the Act, the first question is, whether its provisions are merely directory, and are mere instructions, which the parties concerned may follow or not with impunity, or whether they impose a positive duty on some one. It seems to me that they impose imperative duties, because they give rules of conduct to be observed by persons who are to be paid for the observance of them, and likewise because they are clearly provisions expressly provided by the legislature because they were considered to be the only means of protecting the public interest. The scheme of the Act is as follows: The local authority is to appoint polling districts and places; and then, by s. 8, the returning officer is to provide polling stations, and to have power to appoint and pay such officers as may be necessary; which, by inference from that section and the 10th taken together, includes the power of appointing clerks to assist the presiding officer. There may be several polling stations at one polling place, and the returning officer, by the 21st rule, is to appoint a presiding officer at each station, unless in any case he chooses to preside himself, as by the 47th rule he is entitled to do. The 48th rule confirms the inference that the returning officer is to appoint clerks, if necessary, to assist the presiding officer, for it provides that, in addition to clerks, competent assistance may be provided for the purpose of counting up the votes. The mode in which the voting is to be carried on is provided by the 2nd section, the 23rd, 24th,

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and 25th rules, and the directions to voters. The presiding officer is first to shew that the ballot-box is empty, and it is then to be placed and to remain in his presence. When a voter wishes to vote, he is to have delivered to him a voting paper with the official mark upon it. But this provision alone would not be sufficient to protect the public interest. If the voter, having received such paper, wished to leave the polling station with it, and attempted to do so, it would, as it appears to me, be the duty of the presiding officer to stop him. He is to go immediately into one of the compartments, and, having marked his paper as provided by the Act, he is to fold it up so that the official mark may appear on the back, and then to take it back to the presiding officer and shew him such mark. There is no express enactment that the presiding officer shall look at the mark, but the obvious inference is that it is his duty to be there to do so, and to do so. This is clearly not for the protection of the voter, but for the protection of the public interest, for the purpose of seeing that the paper delivered to the voter with the official mark on it is the paper which is deposited in the box, in order that there may be no opportunity of replacing it by a fictitious one, and so taking it out of the polling station. It seems to me, looking to the scheme of the Act, that it would be frittering away its effect and making it useless for the very purpose for which it was passed, if we did not hold that its intention was that some person who is presiding should deliver the papers, stamped with the official marks, to the voters, and be present for the purpose of seeing, and should actually see, that the paper brought back has such official mark on the back, and that it, and no other, is deposited in the box; and that the provisions for securing these objects are imperative, and not merely directory, on persons who have undertaken to carry them out for reward. Then comes the question, On whom is the duty cast? It seems to me that *primâ facie* it is cast on the presiding officer; and that *primâ facie* he undertakes it, when he accepts the office, by such acceptance. By the 50th rule he has the power of delegating such portions of his duty as he may think fit to a clerk, if appointed; but all such parts of his duty as he may not so delegate he is bound to perform himself. If he delegates a portion of his duty he is not, as it seems to me, liable in respect of acts done by the clerk with

reference to the portion of his duty so delegated, and in which he does not interfere, because the clerk is not his servant; he does not appoint him, and has not the power of choosing him with reference to his competency. He is only responsible in respect of such duties as he keeps in his own hands; but, *primâ facie*, he undertakes all.

The next question is, Whether the duties imposed by the Act are such as to give a right of action against him personally for breaches of them by individuals, if personally aggrieved, without any allegation of malice or wilfulness? I think they are, because they are ministerial duties merely, and the general rule of law is, that a breach of such duties gives a right of action to the party aggrieved thereby. The cases of *Schinotti v. Bumsted* (1), *Tozer v. Child* (2), and *Atkinson v. Newcastle, &c., Waterworks Co.* (3), are authorities to that effect. But it is said that the terms of the 11th section of the Act take the case out of the general law. It may be noticed, in passing, that the 11th section assumes that not only the presiding officer, but a clerk, is responsible for the performance of the duties imposed by the Act. I think, if it were not for the words reserving other remedies, it is possible that the section might bring the case within *Couch v. Steel* (4), though I doubt it. But there are words which expressly state that the penalty is to be in addition to any other liability. Then, if there be any other liability by the general law, that is preserved. Under these circumstances the question arises, whether the declaration sufficiently alleges breaches of these duties which we find to exist, and whether the plaintiff is entitled to maintain this action for such breaches. Mr. Holl suggested that we ought to construe the declaration strictly, on the ground that the action was a hard one; but it seems to me that we are bound to construe it as any other declaration on general demurrer, and to see if it be sufficiently certain to a common intent, &c., if it *primâ facie* shew specific duties and breaches of them, and that the plaintiff was aggrieved thereby. The damages are, as it appears to me, damages at large, and it is not necessary to allege special damage to main-

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(1) 6 T. R. 646.

(3) Law Rep. 6 Ex. 404.

(2) 7 E. & B. 377; 26 L. J. (Q. B.)

(4) 3 E. & B. 402; 23 L. J. (Q. B.)

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tain the action, but only to shew sufficiently that the plaintiff is aggrieved.

It seems to me that the principal question is, whether there is a sufficient allegation in that respect with regard to the first and second counts. Putting aside the allegations with respect to what took place on the petition, which may perhaps be open to the criticisms made on them, it seems to me that the final allegation in each count is sufficient, though of course, as my Lord differs, I feel the point must be doubtful. In my opinion, those allegations are allegations of fact, not of a mere legal conclusion from what goes before. How could the election of the plaintiff have been prevented by the breaches of duty alleged, as it is stated to have been, except by votes having been thrown away in consequence of such breaches of duty? It seems to me to follow that the allegation must be considered as an allegation of a fact resulting from other facts, themselves the result of the breaches of duty. If so, it seems to me that the counts are good.

With respect to the third count, I agree entirely with my Lord, and therefore do not wish to add anything. I therefore think our judgment should be for the plaintiff on all three counts. With regard to the suggestion as to the necessity for alleging the appointment of a clerk, if one were appointed, by way of confession and avoidance, it seems to me that any defence of such a nature would arise on the traverse of the allegations in the declaration with respect to the duty or the breach of it.

GROVE, J. I agree with my Lord that two out of three of the allegations of duty contained in the declaration are good, viz. that of the duty to deliver to the voters voting papers marked with the official mark, and that of being present for the purpose mentioned in the second count. The Act appears to me to cast these duties on the presiding officer for the time being. I say for the time being, because no doubt a clerk may be appointed, and may be representing the presiding officer at the particular time in question, and in some cases the returning officer may elect to perform the duty himself. With regard to the alleged duty of ascertaining that the official mark is on the paper before it is deposited in the box, I agree on the whole with my Lord, though not without

doubt, that there is no such duty imposed on the presiding officer. With regard to the two allegations of duty I first referred to, it seems to me that though there is no section which expressly imposes them on the presiding officer, yet, by necessary implication, it is clear that he is to perform them. With regard to the first, viz. that of delivering the papers marked with the official mark, some person must do it, and who that person is to be, not being expressly pointed out, we must look to the general scheme of the Act to find out. It is not the returning officer, at least not quâ returning officer, or unless he himself undertake the duties of presiding officer. By s. 8, he is to provide the stamping instruments, and to pay such officers as may be necessary for the conduct of the election; but it is provided that he shall appoint a presiding officer who is to act in the immediate conduct of the election at the particular polling station. It seems to follow that this officer is bound to undertake the duty unless the returning officer appoint a clerk to assist, which it is clear from rule 48 he may do; and then, if the duty be delegated to the clerk, he is, for the purposes of the particular function, delegated the presiding officer, as it were, for the time being.

If the provisions of the Act are to be carried into effect at all, it must be that either the presiding officer or the clerk must be responsible for the performance of these duties which are obviously essential, for without papers properly marked with the official mark the voters cannot vote at all, or, at any rate, not effectually. With regard to the duty alleged in the second count, viz. that of being present in order that the voter may shew the official mark on the ballot paper, it is only necessary to look at the 2nd section, which provides that the voter is to place the paper in the box in the presence of the presiding officer, to shew that it is his duty to be present. The 9th and 10th sections, and the 20th, 23rd, and 28th rules in the schedule, and the directions to the voters, all likewise shew by implication that this is his duty. The third question is whether a duty is cast on the presiding officer by the Act to ascertain that the official mark is on the voting paper before it is placed in the box. There is no such duty expressly imposed upon him. The only provision from which it can be implied is the provision that the voter shall shew it to him. It may be said that if

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it is to be shewn him it is his duty to look at it, and so it is, in one sense; but, on the other hand, it would delay the election very much if he were bound so to scrutinise the mark on the paper as to insure its not being a counterfeit one, which would be necessary if he is bound at his peril to ascertain that the mark is on the paper. If the Act had intended that he should be so bound, I think there would have been an express enactment to that effect; whereas I find that there is no such duty cast in terms on the presiding officer, but there is such a duty expressly cast on the voter, for in the directions to the voter it is stated that he is to fold up the paper, leaving the official mark exposed, and to shew such mark to the presiding officer before depositing the paper in the box in the presence of such officer; and then comes a provision that, if the voter deposits in the ballot-box any other paper than that given him by the presiding officer, he shall be guilty of misdemeanour, and subject to imprisonment for any term not exceeding six months. It seems to me that the object to be obtained by the statute, viz. that the paper given to the voter should be the one deposited in the box, was intended to be secured by making it the voter's duty to shew the mark to the officer, and to place the paper so marked in the box, and by making it a highly penal offence on the part of the voter to place another paper in the box. It seems to me difficult to imply in addition a duty on the presiding officer, not only of delivering a marked paper, but one which, if imposed, would involve the duty of so narrowly scrutinising the papers as to guard against the possibility of the substitution of some ingenious forgery for the paper delivered to him.

The question then arises, whether for breaches of the duties imposed by the statute an action will lie; and I am entirely satisfied by the authorities that have been referred to, that, where the duty is purely ministerial, as I think these duties are, an action will lie at the suit of a party aggrieved by a breach of it, without any allegation of malice. With respect to the argument raised upon the 11th section, I should have doubted, even without the words which expressly provide that the remedy there given shall be in addition to other remedies, whether the effect of this section, applying only to wilful breaches of duty, could have been

by implication to take away the remedies which there otherwise would have been for breaches of duty that are not wilful ; but those words seem to me to make it quite clear that the argument is unfounded. With regard to the only other remaining question, viz. as to the sufficiency of the allegation that the plaintiff was aggrieved by the breaches of duty on the defendant's part, I agree on the whole with my Brothers Keating and Brett that there is a sufficient allegation to that effect, though I cannot say I feel very confident on the subject, owing to the division of opinion in the Court. I think the insufficiency of the previous allegations is cured by the final allegation that the plaintiff was prevented from being elected. Leaving out the insufficient allegations, you have still a statement of certain breaches of duty, and that by reason thereof the plaintiff was prevented from being elected. I do not look at this as an allegation of a mere conclusion in law, or, as it is termed, a *virtute cujus*, but as an allegation of a fact which would be traversable. I therefore think all the counts good except with reference to the first and third counts so far as they allege a duty to ascertain that the official mark was on the papers before they were deposited in the box.

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Judgment for the plaintiff.

Attorneys for plaintiff: *Fearon, Clabon, & Fearon, for Henry Hawkes, Birmingham.*

Attorneys for defendant: *Cowdell, Grundy, & Browne.*

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SOWERBY v. SMITH.

June 13.

Inclosure Act—Game—Reservation of Rights of Shooting to Lord of Manor.

Port 707
CPD 444

An inclosure Act directed the commissioners appointed thereby to allot to the lady of the manor, her heirs and assigns, a certain proportion in value of the lands to be inclosed, in lieu of and as a full compensation for the right and interest of such lady of the manor in and to the soil of the said lands, and to allot the residue amongst the other persons entitled to rights of common; and it was enacted that the several allotments should be vested in the allottees respectively, in full bar of and satisfaction for all rights of common and other rights and interests whatsoever in, over, and upon the said lands (except such manorial rights as were thereafter reserved to the said lady of the manor, her heirs and assigns), and that all rights of common should cease over the said lands, except such manorial rights as last aforesaid. The reservation clause reserved to the lady of the manor, her heirs and assigns, all her right, title, or interest in or to the seignory or royalties incident or belonging to the manor, and all rents, quit-rents, and other rents, reliefs, duties, customs, and services, and all courts, perquisites and profits of courts, rights of fishery, and liberty of hawking, hunting, coursing, fishing, and fowling within the said manor, and all tolls, fairs, &c., royalties, jurisdictions, franchises, matters, and things whatsoever to the said manor, or to the lord or lady thereof, incident or belonging, or which had been theretofore held and enjoyed by the lady of the manor or any of her ancestors (other than and except such common right as could or might be claimed by the said lady of the manor as owner of the soil and inheritance of the said commons or waste grounds):—

Deposited in Ex. Ch. 22900524

Held (by Keating and Grove, JJ., Honyman, J., dissenting), that the Act did not reserve to the lady of the manor the right of shooting which she possessed over the lands the subject of the Act by virtue of ownership of the soil.

This was an action for trespass to the land of the plaintiff, and assault. The defendant justified the acts complained of as having been done in the exercise of the right of shooting game on the land of the plaintiff.

The cause was heard at the Lincoln Spring Assizes, 1871, before Brett, J., when a verdict was found for the plaintiff for 40s., subject to the opinion of the court on a special case.

The facts of the case and the arguments sufficiently appear from the judgments.

April 24. *J. W. Mellor*, for the plaintiff, cited *Bruce v. Helliwell* (1); *Ewart v. Graham* (2); *Pickering v. Noyes* (3); *Robinson v. Wray*. (4)

(1) 5 H. & N. 609; 29 L. J. (Ex.) 297.

(3) 4 B. & C. 639.

(2) 7 H. L. C. 331.

52m 45, 772

(4) Law Rep. 1 C. P. 490.

Field, Q.C. (Cock with him), for the defendant, cited *Wickham v. Hawker* (1); *Lord Leconfield v. Dixon* (2); *Askew v. Wilkinson* (3); *Arundell v. Lord Falmouth* (4); *Lloyd v. Earl Powis*. (5)
J. W. Mellor, in reply.

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Cur. adv. vult.

June 13. KEATING, J. This was an action of trespass brought to try the right of the defendant to shoot game over the land of the plaintiff. The case stated between the parties was argued in Easter Term last, before my Brothers Grove and Honyman and myself; and we took time to consider our judgment. There is a difference of opinion on the Bench, and the present is the judgment of my Brother Grove and myself.

In the year 1798 an Act of Parliament was passed, intituled "An Act for dividing, inclosing, allotting, and improving the several open and common fields, ings, meadows, pastures, moors, commons, wastes, and other uninclosed lands and grounds within the township of Messingham and that part of the hamlet of East Butterwick in the parish of Messingham, in the county of Lincoln."

The Act recited that there were within the township of Messingham and that part of the hamlet of East Butterwick within the parish of Messingham several open and uninclosed common fields, wastes, commons, &c., containing together 5000 acres or thereabouts; that Margaret Walker, spinster, was lady of the manor of Messingham, which comprised that part of the said hamlet which lies within the parish of Messingham, and as such was interested in the soil of the waste grounds within the said manor, and was also proprietor of divers messuages and rights of common, &c., within the said township and part of the said hamlet; and that several persons named were entitled to rights of common; and that the said Margaret Walker and several other persons named were the owners and proprietors of the residue of the uninclosed fields, wastes, &c., in the said township and part of the said hamlet, and were also entitled to rights of common in different proportions.

(1) 7 M. & W. 63.

(2) Law Rep. 2 Ex. 202; 3 Ex. 30.

(3) 3 B. & Ad. 152.

(4) 2 M. & S. 440.

(5) 4 E. & B. 485; 24 L. J. (Q.B.) 145. *1712 MS. 286*

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Commissioners were then appointed, who were directed to allot to the said Margaret Walker, her heirs and assigns, as lady of the said manor (exclusive of all other allotments to the said Margaret in respect of her other property), such part of the lands to be inclosed as should be equal in value to one twentieth part of the said commons and waste grounds, "in lieu of and as a full compensation for the right and interest of the said Margaret Walker, her heirs and assigns, in and to the soil of the said common and waste grounds by that Act directed to be divided and inclosed,"—the residue to be allotted amongst the other persons entitled to rights of common: and it was enacted that the several allotments should be vested in the allottees respectively "*in full bar of and satisfaction for all rights of common and other rights and interests whatsoever* in, over, and upon the said lands and grounds hereby directed to be divided and inclosed (except *such manorial rights* as are hereafter reserved to the said Margaret Walker, her heirs and assigns)," and that all rights of common, &c., should cease over the said lands, except such manorial rights as last aforesaid.

Then the reservation clause was as follows:—"And be it further enacted that nothing herein contained shall prejudice, lessen, or defeat the right, title, or interest of the said Margaret Walker, her heirs or assigns, or of any other person or persons who shall respectively for the time being be lady or ladies, lord or lords, of any manor or manors, lordship or lordships, or reputed manors or lordships, within the jurisdiction or limits whereof the said township of Messingham or the said part of the said hamlet of East Butterwick, or the said fields, ings, meadows, pastures, moors, and other commonable lands and waste grounds hereby directed to be inclosed or exonerated from tithes, or any part thereof respectively, are comprised, of, in, or to the seignory or royalties incident or belonging to such manor or lordship, or either or any of them; but that the said Margaret Walker and all succeeding lords and ladies of the said manor shall and may from time to time and at all times hold and enjoy all rents, quit-rents and other rents, reliefs, duties, customs, and services, and all courts, perquisites and profits of courts, rights of fishery, and liberty of hawking, hunting, coursing, fishing, and fowling within the said manor, and all tolls, fairs, marts, markets, stallage, goods and chattels of felons and fugitives,

felons of themselves, and put in exigent, deodands, treasure-trove, waifs, estrays, forfeitures, royalties, jurisdictions, franchises, matters, and things whatsoever to the said manor or to the lord or lady thereof incident or belonging, or which have been heretofore held and enjoyed by the said Margaret Walker or any of her ancestors (other than and except such common right as could or might be claimed by the said Margaret Walker as owner of the soil and inheritance of the said commons or waste grounds), in as full, ample, extensive, and beneficial a manner to all intents and purposes as they respectively could or might have held and enjoyed the same in case this Act had not been made."

Now, the question in this case is, whether the right of shooting over the wastes of the manor belonging to the lord as owner of the soil is preserved by the clause of reservation referred to, so as to give him the exclusive right to shoot over the allotted lands, or whether it is extinguished by virtue of the Act.

There are several cases wherein similar questions have arisen upon Acts of Parliament more or less varying in their language; but the case most relied on by the defendant's counsel was that of *Ewart v. Graham*. (1) In that case the defendant was lord of the manor of Nichol Forest, and owner of a certain uninclosed stinted pasture called Bailey Hope, parcel of the said manor. An Act passed for dividing and allotting Bailey Hope, and one-twelfth was directed to be allotted to the defendant, as lord of the manor of Nichol Forest, in satisfaction for all his right and interest as such lord in and to the soil of the stinted pasture. The mines, &c., however, were reserved, together with *the right of shooting, &c.*, "over the stinted pasture and every part and allotment thereof." The House of Lords held that the reservation was not of seigniorial or manorial rights, but of the territorial rights of shooting over the stinted pasture, to which it was expressly confined, and upon that ground gave judgment in favour of the right. Where, however, in the subsequent case of *Bruce v. Helliwell* (2), the reservation extended to manorial rights, and the right of shooting was not so confined to the wastes to be allotted, but extended throughout the township and manor, the Court of Exchequer held the case distinguishable from *Ewart v. Graham* (1), and decided against

(1) 7 H. L. C. 331. *5 H. L. C. 577*. (2) 5 H. & N. 609.

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the territorial right claimed; being of opinion that the reservation was only intended to preserve any manorial rights the lord might have, if any such existed, and not his territorial rights as owner of the soil. Indeed, the result of all the cases seems to be, that, in each case, the question, in the absence of any right of free warren before the inclosure, is, whether the Act intended to preserve the territorial right of the lord as owner of the soil of the waste to be inclosed, or merely such manorial rights as the lord might be able to shew he possessed before the passing of the Act.

Now, in the present case, the claim of the defendant was rested solely on the territorial right arising from the ownership of the soil, which it was said still existed, having been reserved to the lord under whom he claimed by the Act of Parliament. But we are of opinion that the statute never contemplated the preservation of that territorial right, but intended to extinguish it altogether.

It was admitted that it was so extinguished, unless preserved by the reservation clause. But it appears to us that the rights reserved by that clause were merely manorial rights; for, not only are those rights as thereafter to be reserved expressly described in the Act as manorial rights, but all the rights specified in the clause itself are manorial rights, and the right of shooting specified therein is not confined to the lands to be inclosed, but is extended generally throughout the manor; thereby bringing the case within *Bruce v. Helliwell* (1), and distinguishing it from *Ewart v. Graham*. (2)

It was argued, indeed, that, even if the terms of the reservation clause included the right claimed, the exception in that clause would still have excluded it, under the words "other than and except such common rights as could or might be claimed by the said Margaret Walker as owner of the soil and inheritance of the said common or waste ground;" as, although the word "common" here is in any view inaccurately used, it could only be an exception arising out of the reservation, and the reservation does not include mere commonable user, such as depasturing, &c.

It is, however, unnecessary further to consider that point, in favour of which much might be urged, inasmuch as in our opinion the clause of reservation does not include the right as claimed.

(1) 5 H. & N. 609

(2) 7 H. L. C. 531.

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We think, therefore, our judgment ought to be for the plaintiff.

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HONYMAN, J. This was an action of trespass for breaking and entering two freehold closes formerly parcel of the wastes of the manor of Messingham.

The defendant justified the trespass under an alleged right of shooting over the locus in quo in William Smith, by whose authority he shot there.

The case was tried before Brett, J., at the Lincoln Spring Assizes, 1871, when a verdict was found for the plaintiff, subject to a special case.

By this case it appears that prior to and in the year 1798, a Miss Walker was lady of the manor of Messingham, and also the proprietor of messuages and lands within the manor, as more fully mentioned in the recitals of the Inclosure Act set out in the case.

In the year 1790 an Act of Parliament was passed, intituled, "An Act for dividing, inclosing, allotting, and improving the several open and common fields, ings, meadows, pastures, moors, commons, wastes, and other uninclosed lands and grounds within the township of Messingham, and that part of the hamlet of East Butterwick in the parish of Messingham, in the county of Lincoln."

By that Act it was recited as follows:—"Whereas there are within the township of Messingham, and that part of the hamlet of East Butterwick which lies within the parish of Messingham, in the county of Lincoln, several open and uninclosed common fields, ings, meadows, pastures, moors, commons, wastes, and uninclosed lands and grounds which are distinguished by several names, and which contain together 5000 acres or thereabouts; And whereas Margaret Walker, spinster, is *lady of the manor* of Messingham aforesaid, which comprises that part of the said hamlet of East Butterwick which lies within the said parish of Messingham, and *as such is interested in the soil* of the waste grounds within the same manor; and the said Margaret Walker is also proprietor of divers messuages and rights of common, and of several inclosures and open and uninclosed lands and grounds within the said township and part of the said hamlet: And

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whereas the Right Rev. the Lord Bishop of Lincoln is impropiator of the rectory and grange of Messingham aforesaid, and Mary Sanderson, of Hammersmith, in the county of Middlesex, widow, is lessee thereof; and the said bishop and the said Mary Sanderson as his lessee are entitled to all the great tythes growing, renewing, or arising within the tythable places of and part of the said hamlet, and to certain glebe lands and right of common in the said open common fields, ings, meadows, pastures, moors, commons, wastes, and uninclosed grounds: And whereas the said Bishop of Lincoln and the right worshipful the dean and chapter of the cathedral church of the Blessed Virgin Mary, of Lincoln, are alternate patrons of the united vicarage of Messingham-with-Bottesford; and the Rev. Edward Jorden, clerk, is the present vicar, and as such vicar is entitled to certain glebe lands and rights of common, and all vicarial tythes yearly arising and increasing within the said parish of Messingham: And whereas the said Margaret Walker, John Henry Maw, and Francis Edward Morley, Esquires, Thomas Raven, Richard Roadley, and several other persons, are the owners and proprietors of the residue of all the said open common fields, ings, meadows, pastures, moors, commons, wastes, and other uninclosed lands and grounds in the said township of Messingham, and that part of the said hamlet of East Butterwick in the said parish of Messingham, and are respectively entitled to rights of common and other rights therein in different proportions: And whereas the several lands of the said proprietors in the said open fields, ings, meadows, and pastures, lie intermixed and dispersed in small parcels, and inconveniently situated for the several owners and proprietors thereof; and the same, as also the said commons and waste grounds, are capable of great improvement by an inclosure, and it would be also very beneficial to the said owners and proprietors in general if the said fields, ings, meadows, pastures, moors, commons, wastes, and other uninclosed lands and grounds were divided and inclosed, drained, and improved, and specific parts allotted to the said several persons interested therein, in proportion to their respective property, rights of common, and other interests therein, and satisfaction made for all the tythes within the said township and said part of the said hamlet, in manner hereinafter mentioned."

Commissioners were appointed for allotting and inclosing the open common fields, wastes, and other uninclosed lands and grounds, and were required, after making allotments for repairs of roads and other purposes, to set out and allot to Miss Walker, her heirs and assigns, as lady of the said manor (exclusive of all other allotments of Miss Walker in respect of her other property), such part of the residue of the commons and waste grounds as should, in the judgment of the commissioners, be equal in value to one-twentieth of the said commons and waste grounds, in lieu of and as a full compensation for the right and interest of Miss Walker, her heirs and assigns, in and to the soil of the said commons and waste grounds.

The commissioners were also required to assign, allot, set out, and divide the residue of the said commons and waste grounds within the township and hamlet amongst the persons having rights of common therein: and it was provided by the Act that the allotments to be made under it should be held by the same tenure as the lands in respect of which the allotments were made.

The Act went on to provide that the lands and grounds to be set out and allotted to the persons who by the Act were entitled to the same should be vested in them respectively in full bar of, and satisfaction for, all rights of common and other rights and interests whatsoever in, over, and upon the said lands and grounds directed to be divided and inclosed (except such *manorial rights* as were thereafter reserved to Miss Walker, her heirs and assigns); and that, immediately after the making of the division and allotment, all rights of common in, over, and upon all the lands and grounds thereby intended to be inclosed, and all tithes and other ecclesiastical payments arising out of the said commons and waste grounds, and all other lands and grounds lying within the said township and hamlet (except such manorial rights as last aforesaid, mortmain, Easter offerings, and surplice-fees) should cease, determine, and for ever be extinguished.

The Act also contained the following clause:—"And be it further enacted that nothing herein contained shall prejudice, lessen, or defeat the right, title, or interest of the said Margaret Walker, her heirs or assigns, or of any other person or persons who shall respectively for the time being be lady or ladies, lord or lords,

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of any manor or manors, lordship or lordships, or reputed manors or lordships, within the jurisdiction or limits whereof the said township of Messingham, or the said part of the said hamlet of East Butterwick, or the said fields, ings, meadows, pastures, moors, and other commonable lands and waste grounds hereby directed to be inclosed or exonerated from tithes, or any part thereof respectively, are comprised, of, in, or to the seignory or royalties incident or belonging to such manor or lordship or either or any of them; but that the said Margaret Walker and all succeeding lords and ladies of the said manor shall and may from time to time and at all times hold and enjoy all rents, quit-rents, and other rents, reliefs, duties, customs, and services, and all courts, perquisites and profits of courts, *rights of fishery, and liberty of hawking, hunting, coursing, fishing, and fowling within the said manor*, and all tolls, fairs, marts, markets, stallage, goods and chattels of felons and fugitives, felons of themselves, and put in exigent, deodands, treasure-trove, waifs, estrays, forfeitures, royalties, jurisdictions, franchises, matters, and things whatsoever *to the said manor* or to the lord or lady thereof *incident or belonging*, or which have been heretofore held and enjoyed by the said Margaret Walker or any of her ancestors (other than and except such *common* right as *could* or might be claimed by the said Margaret Walker *as owner of the soil and inheritance of the said commons or waste grounds*), *in as full, ample, extensive, and beneficial a manner to all intents and purposes as they respectively could or might have held and enjoyed the same in case this Act had not been made.*"

On the 15th of October, 1804, the commissioners made their award, and thereby, after stating that the ancient inclosed lands contained 488 acres, and that the fields, ings, meadows, pastures, moors, commons, wastes, and uninclosed lands directed to be divided and inclosed contained 5660 acres, allotted and awarded to the Misses Walker (the devisees of the Miss Walker mentioned in the Act, and the then ladies of the manor, and owners of Miss Walker's freehold property), four allotments, containing 170 acres, and in their judgment equal in value to one-twentieth of the wastes, &c., in lieu of and as a full compensation and satisfaction for *the right and interest of the then ladies of the manor* in and to the soil of the said commons and waste grounds.

The commissioners by their award also assigned, allotted, and divided the residue of the open common fields, ings, meadows, pastures, moors, commons, wastes, and other uninclosed lands and grounds, to the several persons therein mentioned, to be vested in them in full bar and satisfaction for all common rights and other interests of the said persons therein, and also in lieu of and as compensation for such closes or parcels of ancient inclosures as were therein directed to be exchanged.

To the Misses Walker were awarded 757 acres, of which between one and two acres was in respect of old inclosures taken in exchange.

The William Smith under whom the defendant justified is the now lord of the manor of Messingham, and the owner of the property formerly belonging to Miss Walker.

The special case set out a quantity of evidence as to the persons who had since the award shot over the ancient freeholds within the manor and also over the allotments which had formerly been parcel of the wastes and commons of the manor; but it is unnecessary to refer to this evidence, as Mr. Field, who argued the case for the defendant, admitted that he could not support a claim put forward by Mr. William Smith to a right of free warren over the lands within the ambit of the manor, or to a prescriptive right to shoot over the whole of the manor, and that the only ground on which the defendant could justify the trespass in question was, that, before the Inclosure Act, the lord of the manor had by virtue of his ownership of the soil a right to shoot over the wastes of the manor, and that this right was not taken away by the provisions of the Inclosure Act. I may, however, observe that there appeared to have been constant disputes as to the right to shoot over the allotments since the inclosure; and there was consequently no such usage as to amount to an exposition of the intention of the legislature, supposing such usage to be admissible for that purpose.

Mr. Mellor, who appeared for the plaintiff, contended that the allotment of one twentieth of the wastes, &c., was intended to be in full satisfaction of all the lord's rights as owner of the soil, including the right to sport over the wastes; and that, after the inclosure, the sole right of sporting over the various allotments of the wastes was in the respective owners of such allotments.

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inafter reserved." But I think this short mode of referring to the subsequent reservations may well refer to a right of shooting which the lord enjoyed only because he was lord of the manor and as such owner of the soil of the wastes of the manor.

If I am right in this view, it only remains to consider whether the words of the exception to the reservation clause to which I have already alluded, are sufficient to distinguish this case from that of *Ewart v. Graham* (1); and I am of opinion that they are not.

It is difficult to put a technical legal meaning on the words in question: but I think that they may be fairly construed as applying to rights which the lord of the manor exercised conjointly with the persons entitled to rights of common, such as the right of turning out cattle and the right to cut turf, although the right in this respect of the lord may not be, legally speaking, a right of common, and may be greater than that of the commoners, as he was not limited in the exercise of the right, provided he left a sufficiency of common for the commoners; and that they ought not to be construed as applying to rights to which the lord was entitled to the exclusion of all others, such as the right of sporting over the wastes.

For instances of a meaning not strictly the legal one being given to similar words, see the cases of *Askew v. Wilkinson* (2), *Lloyd v. Lord Powis* (3), and *Greathead v. Morley*. (4)

It has been suggested that these words are to be construed as "rights over the commons." But, in my opinion, this is not their proper construction; and I think we ought not to cut down the operation given to the reservation clause by the House of Lords, by attributing this effect to words of such ambiguous meaning.

The case of *Bruce v. Helliwell* (5) was decided in the year 1860, after the decision of *Ewart v. Graham* (1); and it was there held that the exclusive right of the lord to kill game on the inclosed lands was taken away: but there the Act expressly excepted from the reservation to the lord "such right" (not saying "common") "as might be claimed by him as owner of the soil;" and there were no words, as in this case and in *Ewart v. Graham* (1), suffi-

(1) 7 H. L. C. 331.

(2) 3 B. & Ad. 152.

(3) 4 E. & B. 485.

(4) 3 M. & G. 139.

(5) 5 H. & N. 609.

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cient to preserve to the person who was lord of the manor at the time of inclosure the right of shooting, after he ceased to fill the character of owner of the soil of the wastes. In that case, too, the words of the clause which it was contended gave the lord the right to the game applied to lands not within the manor; and, as remarked by Bramwell, B. (1), it could not be contended that the intention was to confer on the lord the right to sport on lands over which he had no such right before; whereas, here, as in *Ewart v. Graham* (2), the reservation is only over the wastes proposed to be inclosed, over which the lord before the inclosure had the right of sporting.

The other case relied on by Mr. Mellor, *Robinson v. Wray* (3), was decided on an Act of Parliament the language of which is so different from that before us that it has no bearing upon the present case.

Neither do I think that *Lord Leconfield v. Dixon* (4) is an authority bearing on this case. There, the 20th section of the Inclosure Act directed an allotment to the lord in satisfaction of his rights as owner of the soil (except as thereafter excepted), and the reservation clause reserved all rights except such as were expressly taken away by the Act; and it is therefore, in my opinion, no authority in favour of the present defendant.

Under these circumstances, I think that this case falls within the authority of *Ewart v. Graham* (2), by which we are bound, and that our judgment ought consequently to be for the defendant. But the case is to my mind by no means a clear one, depending as it does on language to which it is very difficult to give a clear or satisfactory meaning; and I need hardly say that the doubts which I cannot but feel as to the soundness of the conclusion at which I have arrived are considerably increased by the fact of my two learned Brothers, for whose opinion I entertain the highest respect, having arrived at a different conclusion.

Judgment for the plaintiff.

Attorneys for plaintiff: *Scott & Co.*

Attorneys for defendant: *Pilgrim & Phillips, for Smith & Hinde.*

(1) 5 H. & N. at p. 621.

(2) 7 H. L. C. 331.

(3) Law Rep. 1 C. P. 490.

(4) Law Rep. 2 Ex. 202; Ex. Ch. Law Rep. 3 Ex. 30.

[IN THE EXCHEQUER CHAMBER.]

JOHNSON v. BARNES.

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June 18.

Exclusive Right of Pasturage—Immemorial Exercise of a Right—Presumption of legal Origin—Misdescription in ancient Documents.

The corporation of a borough had from time immemorial exercised, by actual enjoyment by the free burgesses or by way of receipt of rent or acknowledgment, a right of pasturage for all cattle, sheep, and other commonable animals, levant and couchant within the borough, over lands in the neighbourhood of the borough, during a certain season of the year, and there was no evidence that during such season the owners or occupiers of the lands in question, or any other persons, had exercised the right of pasturage over such lands. The corporation had, from the time of Henry VIII., from time to time exercised the right of releasing for valuable consideration their rights of pasturage over portions of the lands subject thereto, still continuing to exercise their rights over the rest as before, without any resistance thereto upon the ground that the release of the part of the land extinguished the right as to all, which would have been the case with a mere right of common. In the releases and other deeds of conveyance made by the corporation in reference to their rights, they had always been described in terms which would be appropriate to rights of common strictly so called :—

Held (affirming the decision of the Court below), that according to the principle of law by which a legal origin is, if possible, to be presumed for a long-established practice, it must be presumed that what the corporation was entitled to was “sola vestura,” or an exclusive right of pasturage over the lands in question, and not a right of common, which would have been extinguished by a release of part of the land, notwithstanding the description of the right as a right of common in a long series of documents.

ERROR from the judgment of the Court of Common Pleas in favour of the defendant upon a special case. (1) The facts sufficiently appear from the report of the case in the Court below, and the judgment of the Court.

Joshua Williams, Q.C., (Prentice, Q.C., and Thesiger, with him), for the plaintiff. It is well established law that a right of common is extinguished by a release of part of the land originally subject to it: Co. Litt. 122 a. This is equally the case with respect to common in gross as with respect to common appurtenant.

The Court below made the presumption that in this case there was a right of common in gross originally created with a power to grant or release any portion of the land. It is submitted that this

(1) Law Rep. 7 C. P. 592.

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is a most violent presumption to make, such a power being wholly inconsistent with the well-known legal incidents of a right of common.

[BLACKBURN, J. The real question in the case seems to be, what was the nature of the right which the corporation had. It may be a right of common properly so called, or an exclusive right of pasturage or "sola vestura" in the lands in question. If they had an exclusive right of pasturage on the land during a certain part of the year, a release of part of the land would not extinguish the right.]

That must be admitted; but, in all the corporation documents with reference to this right of pasture, the releases and conveyances of it and the constitutions or bye-laws mentioned in the case, it is always spoken of as a right of common. It is confined to cattle levant and couchant within the borough,—a restriction wholly inappropriate to an exclusive right of pasturage. The right which is called sola vestura, or an exclusive right of pasturage, is a very unusual right, and it is submitted that it would be a very strong presumption to make that such a right existed, seeing that in a series of formal documents the right is always spoken of as a right of common.

[BLACKBURN, J. If your contention is right, and the first release of a portion of the lands extinguished the right, the exercise of the right of pasturage on the part of the corporation is an usurpation extending over a long series of years. Ought we not, according to the general principles of law, to presume a legal origin, if one be possible, for the right so exercised?]

It is true that a legal origin is to be presumed, if possible, in favour of a right which has long been exercised de facto; but, if the facts shew what the nature of the right was in its origin, a long-continued usurpation in excess of the right cannot alter its nature. It is contended that it sufficiently appears from the documents and facts in this case that this right was, in its origin, a right of common.

[He cited *Mellor v. Spateman* (1); *Corbet's Case* (2); *Shuttleworth v. Le Fleming* (3); *Attorney-General v. Mathias*. (4)]

(1) 1 Wms. Saund. 612.

(2) 7 Co. 5.

(3) 19 C. B. (N.S.) 687; 34 L. J. (C.P.) 309. *11 June 1875. 841*(4) 4 K. & J. 579; 27 L. J. (Ch.) 761. *4 June 1875. 628*

J. Brown, Q.C. (R. E. Turner with him), for the defendant, was not called upon.

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KELLY, C.B. I am of opinion that the judgment of the Court below should be affirmed. Some difficulty no doubt arises from the continuous use in the documents relating to the right in question of terms indicating a right of common. I think, however, we are bound to presume a legal origin, if such be possible, in favour of a right which appears, from the facts stated in the case, to have existed for many hundreds of years, and that the inaccurate description of such a right in a series of conveyances cannot interfere with the presumption which we should otherwise be entitled to make from the facts with relation to the enjoyment of the right. When we look to these facts, we find that the corporation of Colchester has in fact exercised a right of pasturing an unlimited number of cattle or sheep on certain lands around the walls of the town during a certain season of the year, except as to any part of the lands under cultivation. There is no evidence of any claim to exercise, or any actual exercise, by the owners or occupiers of the lands in question, of a concurrent right to depasture cattle in such lands during such period of the year. If any such claim had been made or right exercised, it would certainly have appeared in the case. So far from such being the case, we find that the plaintiff in the present case himself rented from the corporation the right of depasturing cattle on the farm in question. It seems to me manifest that what the corporation have exercised from time immemorial is a right which, though frequently spoken of as a right of common, was, in fact, an exclusive right of pasturage. There seems to have been no limitation as to the number of cattle which might be depastured, except so far as the constitutions or regulations made by the corporation to limit the exercise of the right by the burgesses inter se are concerned. We have been referred to some of these constitutions, by one of which each burgess is restricted to three head of great cattle or ten sheep, and by one of the very early constitutions it appears that the right is to be confined to cattle levant and couchant within the borough. This latter restriction was very probably the origin of the right getting to be spoken of as a right of common, inasmuch as the

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limitation of such a right to a fixed number of cattle levant and couchant is frequently an incident of common right. The passage in Morant to which we were referred, as clearly shewing this to have been a right of common, seems to be easily explained with reference to this restriction. The passage relates to some person's having been fined for putting cattle on the common, and gives as a reason why this should be a right of common the presentment in the case, which states that "*non est burgensis nec aliquam terram habet in communia.*" It seems to me that this refers to the restriction of the right of the burgesses to cattle and sheep levant and couchant within the borough; and meant that the person in question, having no land upon which the cattle could be so levant and couchant, could not be entitled to depasture the common. Such, so far as the facts are concerned, appearing to have been the nature of the ancient right exercised by the corporation, we find that a great number of releases or assignments of the right on certain portions of the lands over which it was exercisable have been made, beginning from the time of Henry VIII., and that in the period between 1807 and 1820 the consideration for these releases amounted to no less a sum than 5000*l.* We are now called upon to say that all this long series of transactions were null and void, and that the corporation have been selling as a valuable and important right, and the persons who were parties to these transactions have all along been purchasing for very considerable sums of money, that which had no existence in law at all. Authorities have been cited to shew that common appurtenant is extinguished by a release of a portion of the common, and that this would also apply to any other right of common except common appendant. The consequence would be, according to the plaintiff's contention, that the first of the releases that have been made would have extinguished the right of common altogether, and left nothing upon which the subsequent releases could operate. The facts as to these releases are themselves most strong to shew that the right actually exercised must have been an exclusive right of pasturage, and not a right of common. Then we come to what has been made one of the most important questions in the case, that is to say, Supposing that the right actually exercised has always been in fact a right of exclusive pasturage, and

has always been treated and dealt with as such, is the presumption which would naturally arise from the facts destroyed by the effect of a long and numerous series of documents in which the right is spoken of in expressions indicating a right in the nature of a right of common? I do not think we should be justified in giving this effect to the documents, if the result would be to set aside a right which has been so long exercised in fact, which has been made the subject of so many transactions involving large sums of money, and which has never been made the subject of complaint or remonstrance on the part of those adversely to whom it was exercised. It appears to me that it is very easy to see how this right came to be misdescribed as a right of common, when we remember that it was exercised by the burgesses in common inter se; and that it was exercised under restrictions of such a nature as are usually applicable to rights of common, such, for instance, as the restriction to beasts levant and couchant within the borough. It appears to me, therefore, on consideration of the whole of the facts and documents in this case that we are bound, in accordance with one of the best established principles of law, to presume a legal origin, if one were possible, in favour of a long and uninterrupted actual enjoyment of a right, and that our judgment in this case should be for the defendant.

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MARTIN, B. I am of the same opinion. The real question in the case seems to me to be, what was the nature of the right exercised by the corporation. If it was a right of common, then, according to the old rule which was the law as early as the time of Littleton, the release of a part of the land over which the right was exerciseable would extinguish the right, and Mr. Williams's contention would prevail. If it was not a right of common, but an exclusive right of pasturage, then it is admitted that his contention must fail. I am clearly of opinion, looking to the facts of this case, that this was an exclusive right of pasturage to which the corporation of Colchester was entitled over certain lands during a certain season of the year, though it has been miscalled a right of common. It might, perhaps, be called a right of common, as being exercised by the burgesses in common; but it seems to me that the right pointed to by all the facts as to the use and enjoy-

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ment is certainly not a right of common in the legal sense of the word, but a right of exclusive pasturage. The conveyance of the land under which the plaintiff took is expressly made subject to this right, and so there is no hardship in the case.

BLACKBURN, J. I am of the same opinion. I only wish to mention the case of *Rea v. Churchill* (1), which refers to a right of exclusive pasturage as existing in the corporation of Nottingham almost precisely similar to that which is here alleged by the defendant to exist in the corporation of Colchester. The question there was, whether such a right was rateable. It is worthy of notice that Littledale, J., in his judgment, speaks of the right as a right of common, and so also Willes, J., in the Court below, spoke of this right as a right of common. With all respect to two judges so eminently learned in matters of ancient law, I should say the language they used was not strictly accurate in this respect. But if they were right, according to their view the corporation here have the right which they lay claim to; and if they were wrong in the terms they used in relation to such right, then it is not very extraordinary that the burgesses of Colchester should have been as inaccurate in the language they used in describing their right; and therefore I do not think that the arguments derived from the description of the right as a right of common in the documents is worth very much. That argument seems to be substantially the whole of the argument for the plaintiff. For, if the right exercised by the corporation of Colchester was the same as that in the Nottingham case, then admittedly the defendant must succeed. With the exception of this description in the documents, all the facts since the time of Henry VIII. point to this right as exercised in fact being similar to that in the Nottingham case.

CLEASBY, B., and QUAIN and ARCHIBALD, JJ., concurred.

Judgment affirmed.

Attorney for plaintiff: *Steele*.

Attorneys for defendant: *H. J. & T. Child*.

[IN THE EXCHEQUER CHAMBER.]

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June 19.

REVELL v. BLAKE.

Bankruptcy—Jurisdiction of County Court—Adjudication—Execution against Goods of Bankrupt Trader—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 10, 59, 71, 72, 80, and 87.

The 59th section of the Bankruptcy Act, 1869, provides that if the person sought to be adjudged a bankrupt reside or carry on business within the London Bankruptcy District "the Court" shall mean, for the purposes of the Act, the Court of Bankruptcy in London, but that if the person sought to be adjudged a bankrupt do not reside or carry on business within the London Bankruptcy District "the Court" shall mean the county court of the district within which he resides or carries on business.

A bankruptcy petition in the form required by the bankruptcy rules containing, among other necessary allegations, a statement that the debtor did not reside or carry on business in the London district, was presented to the county court of the district in which the debtor resided, accompanied by the usual affidavit of verification required by the rules.

The debtor did not appear on the hearing, and the county court adjudicated him a bankrupt in the usual form.

The debtor did, in point of fact, carry on business within the London district under an assumed name:—

Held (affirming the decision of the Court below), that the adjudication was not void, notwithstanding that the bankrupt did in fact carry on business in London, but merely irregular, and could only be questioned by proceedings in the way of application or appeal to the Court of Bankruptcy itself.

In order that the 87th section of the Bankruptcy Act, 1869, may be applicable, it is not necessary that the debtor should have been adjudicated bankrupt as a trader, but only that he should be in fact a trader.

APPEAL from the decision of the Court of Common Pleas discharging a rule to enter a verdict for the defendant. The facts are fully stated in the report of the case in the Court below. (1)

Benjamin, Q.C. (*Morgan Howard* and *Bathurst*, of the Chancery Bar, with him), for the defendant, the appellant. The adjudication in bankruptcy was pronounced by a Court that was not competent to pronounce it, for by the 59th section if the person sought to be adjudged a bankrupt reside or carry on business within the London bankruptcy district, "the Court" shall mean, for the purposes of the

(1) Law Rep. 7 C. P. 300.

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Act, the London Bankruptcy Court. Therefore the London Bankruptcy Court was the proper court to have dealt with the case, and the proceedings were *coram non judice*.

[KELLY, C.B. Had not the county court jurisdiction on the facts then before it? Can it be that the whole proceedings which may have been taken in the county court, *bonâ fide*, and in utter ignorance of the fact that the debtor carried on business in London, are, by reason of such fact, utterly void?

BLACKBURN, J. Is not the remedy by proceedings in the way of appeal to the Bankruptcy Court, and not by treating the adjudication as a nullity in a Court of common law?]

The defendant is no party to the bankruptcy, and had nothing to do with it. It is very doubtful whether he would have had any *locus standi* for appealing. He was not aggrieved by the mere adjudication. It is only when it is sought to take away from him the fruit of his execution that he is injured. Besides, he would know nothing about the bankrupt's carrying on business in London at the time. The adjudication was against the debtor as a non-trader.

[BLACKBURN, J. He had notice that a bankruptcy petition was presented, and that it was sought to deprive him of the fruits of the execution, which could only be done if the bankrupt was a trader.]

The notice is only to the sheriff, and it does not necessarily follow that it would be communicated to the execution creditor.

[BLACKBURN, J. In the usual course of things it would be.]

Moreover, the petitioning creditor knew, before the adjudication was obtained, that the debtor carried on business in London, for he had previously made an application on an affidavit which shewed that he did so carry on business, for the appointment of a receiver in respect of such business. The proceedings in the county court were deliberately persisted in because fresh proceedings in the London court would have been too late to affect the defendant's execution.

The defendant having then procured an order from the court, which it had not jurisdiction to make, by misstatement and concealment of the truth from the court, cannot be entitled to set it up as against a person no party to the bankruptcy.

[BLACKBURN, J. In order to be entitled to treat the judgment of the Bankruptcy Court as void without setting it aside, must you not prove fraud on the part of the defendant? What evidence is there of fraud?]

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It is submitted that even without moral fraud a man cannot be placed, by a judgment procured by a false affidavit, which, if the court had known the facts, it had no jurisdiction to make, in a better position than he would have been in if the court had known the facts: *Reg. v. The Saddlers' Company* (1); *Earl Brandon v. Becher* (2); *White, Ex parte, Re Tommey*. (3)

[KELLY, C.B. The fraud, if any, was that of the petitioning creditor: how can that affect the trustee, who represents other creditors besides the petitioning creditor?]

In the case of *Re Buckland* (4), proceedings which had been commenced by mistake in the wrong court were ordered to be transferred by the Chief Judge in Bankruptcy to the right one, all parties concurring in their being so transferred.

[KELLY, C.B. That shews that they cannot be in such a case a mere nullity.]

The transfer was by consent of all parties in the case. The proceedings ought at any rate to have been transferred here, and then the Chief Judge in the exercise of his equitable jurisdiction would have made it a term of the transfer that the execution creditor should not be put in a worse position by reason of the transfer.

Secondly, the 87th section only applies to a case where the adjudication is against the debtor as a trader. It is part of the scheme of the Act, to be collected from the Act itself, and the rules and forms which by the 78th section are to be read as if contained in the Act, that on the face of the proceedings it should appear whether the bankrupt is proceeded against as a trader or non-trader. The acts of bankruptcy are not the same for a trader as for a non-trader. The consequences of the adjudication are different in the case of a trader with respect to reputed ownership, and various other matters; and in the forms of petition and adjudication provision is made that when the proceedings are

(1) 10 H. L. C. 404, at p. 431.

(2) 3 Cl. & F. 479.

(3) 4 H. L. C. 313.

(4) Law Rep. 15 Eq. 221.

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against a trader, it shall be so expressed. On the face of all the proceedings in the present case it appeared that they were against the bankrupt as a non-trader.

R. V. Williams (*W. G. Harrison* with him), for the plaintiff, the respondent.

[THE COURT intimated that he need not deal with the point as to fraud, inasmuch as they were of opinion that there was no evidence of fraud in the procuring of the adjudication.]

The order of adjudication is conclusive in all Courts whatever, except the Bankruptcy Court itself, by virtue of sect. 10. It was the intention of the Legislature, clearly to be gathered from the terms of the Act, to create a new superior Court for the purposes of bankruptcy, whose proceedings should not be subject to be questioned in any other Court on collateral matters. The sections which contain the limits of the jurisdictions of the local courts of bankruptcy are directory merely, or at any rate are so far so that non-observance of their provisions does not make the proceedings a nullity, but only an irregularity. By the 71st section a remedy is provided for any such irregularity by means of a series of appeals, ending with the House of Lords. The county court judge must have power to inquire into and determine, on the evidence before him, the facts on which his jurisdiction depends. The 72nd section clearly gives him such power. Here the county court judge, on presentation of a petition containing on the face of it all allegations necessary to give him jurisdiction, must be taken to have inquired into and decided, on the evidence before him, on a fact, the determination of which was essential to his jurisdiction. The authorities shew that in such a case it is not because it appears ever so clearly afterwards that the fact was otherwise, that the judgment can be treated as a nullity.

The 87th section does not require an adjudication against the bankrupt as a trader. It is clearly sufficient to satisfy the terms of the section that the bankrupt should be a trader in fact.

Benjamin, Q.C., in reply.

KELLY, C.B. I am of opinion that the judgment should be affirmed. It appears to me that, when this case comes to be fully considered, no question of jurisdiction really arises. Every county

court, with the exception of those expressly excluded from the exercise of bankruptcy jurisdiction by the order [of the Lord Chancellor, has jurisdiction to receive, consider, and determine any petition in bankruptcy that is presented to it, and to adjudicate the party petitioned against a bankrupt, provided that enough appears upon the petition to call on the judge to pronounce such adjudication. The language of the 59th section might, at first sight, appear to make it a condition precedent to the jurisdiction of the county court that the party petitioned against did not in fact reside or carry on business in the London district. But it appears to me impossible to hold, when a petition, perfectly good on the face of it, is presented, containing allegations that, if proved to the satisfaction of the judge would render it imperative upon him to pronounce an adjudication, and such allegations are so proved, that the jurisdiction of the judge should depend upon whether or not the bankrupt did actually reside or carry on business in the London district, a fact which the county court can have no means of knowing or ascertaining. If we look to the 8th section of the Act, we find what is necessary to constitute a good petition. It appears to me that, whenever a petition is presented which satisfies the requisites of the Act, the judge is bound to entertain that petition, and, if satisfied that the allegations therein are true, and that the party petitioned against is liable to be made a bankrupt, to pronounce an adjudication of bankruptcy against him. The 8th section says, that "at the hearing the court shall require proof of the debt of the petitioning creditor, and of the trading, if necessary,"—meaning thereby that, if it be essential that the petition should allege trading, it shall be proved, and, if not, it need not be proved,—“and of the act of bankruptcy, &c., and, if satisfied with such proof, shall adjudge the debtor to be bankrupt.” In the petition in the present case, a petitioning creditor’s debt of sufficient amount was alleged; there was nothing alleged about any trading, except that the party petitioned against did not reside or carry on business in the London district, because nothing more was necessary, and then a sufficient act of bankruptcy was alleged. If satisfied with the proof of these allegations, what could the county court judge do but pronounce an adjudication of bankruptcy? The Act says,

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that, "if satisfied with such proof, he shall adjudge the debtor to be bankrupt." He has no discretion in the matter. I apprehend that every county court judge has a general jurisdiction in bankruptcy; and that when a petition is presented to him his duty is to look whether the allegations on the face of it are sufficient to render the debtor liable to be adjudicated a bankrupt, and to receive evidence thereof; and, if no cause is shewn against it, and the bankrupt does not appear, he may take a mere affidavit of the truth of the allegations as sufficient proof, and may declare the petition proved, and then not only has he jurisdiction, but it becomes his absolute duty to pronounce an adjudication in bankruptcy. It appears to me, therefore, that, the petition in the present case being correct in point of form and containing all the allegations necessary in order to make the debtor liable to be adjudicated a bankrupt, the county court judge clearly had jurisdiction to declare him a bankrupt. But then it is said that the debtor was in fact a trader within the London district. The question is, whether the existence of this fact, which is not alleged but denied in the petition, and which was not in any way called to the attention of the county court judge, can invalidate the adjudication. Let us consider what the consequences would be. A man might have been adjudicated a bankrupt at Liverpool or Manchester, within one of the county court districts there, on a petition perfectly good in point of form, the bankrupt shewing no cause against it, all the allegations of the petition having been duly sworn to, and there being nothing whatever before the judge to raise a doubt as to any of them; a trustee might have been appointed; proofs of debts might have been received; assets collected; a large amount have been distributed among the creditors as dividends; the whole of the affairs wound up, and a year or more have elapsed, and then it might turn out that, unknown to all the parties concerned, the bankrupt was a partner in some business, or was the holder of one or two shares in some joint stock bank, standing, in point of law, on the footing of a partnership, in London. Can it be argued that in such a case the whole of the bankruptcy proceedings were null and void? The consequences would be most serious. But I see nothing in the Act, when its provisions are duly considered, to lead to the conclusion

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that the adjudication would, in such a case, be void. Suppose, instead of the debtor failing to appear, he had appeared and shewn cause against his being adjudicated a bankrupt, on the ground that unknown to the petitioning creditor he was really carrying on the business of a wine merchant in London. His mere allegation of that fact clearly would not have justified the county court judge in holding the fact proved. He would be obliged to inquire into the matter, and, if necessary, receive evidence; and on such evidence it might or might not turn out that the debtor was a trader in London. But does not the fact that the county court judge could not, on the mere allegation of the debtor, dismiss the petition, but must satisfy himself whether it is true or untrue, shew that it must rest with him to ascertain and determine, for the purposes of jurisdiction, how the fact stands, and, if he be satisfied that the debtor is not carrying on business in London, adjudicate him a bankrupt? He may possibly come to a wrong conclusion on the evidence. If so, what is the remedy? Is it necessary that the adjudication should be void, or is there to be found, on considering the other sections of the Act, any other remedy? We find in the 71st and 72nd sections ample provisions to meet the requirements and the justice of the case, where a county court judge has come to a wrong conclusion, either by reason of a fact being suppressed or not made known to him, or from any other cause. By the 71st section the county court may itself be appealed to to rescind or vary any order which it has made. In any case where a person interested failed to appear through some accident on the first hearing, he might apply for a rehearing and state the reason for his non-appearance, and shew that the debtor carried on business in London; and it might be the duty of the judge, if satisfied of the facts, to rescind the order of adjudication, and leave the petitioning creditor to take proceedings in the London Court. Moreover, there are ample provisions in the same section for appeals by a party aggrieved against any order of the Court of Bankruptcy. It is unnecessary at present to determine whether the execution creditor was a person aggrieved by the order of adjudication within the provisions of this section, though I am disposed to think that any person whose interests are really affected by the adjudication, particularly a person in the

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position of the defendant, whose right to a large sum of money depended upon it, would be a person so aggrieved. There is, at any rate, a provision that any person aggrieved may appeal against the adjudication; and, no doubt, upon any such person's so appealing and setting forth facts which would shew the adjudication ought not to have been made, and which would render it improper that the proceedings should go on, the adjudication would be set aside. If there were any serious doubt on the question whether it is competent to the county court judge himself to inquire into and determine the question whether the debtor were a trader in London or not, it would be only necessary to refer to the 72nd section, which appears to confer, in the very largest terms, all powers necessary to the determination of any question of fact arising in relation to bankruptcy proceedings. [The Lord Chief Baron here read the section.] I apprehend that upon the terms of that section there can be no doubt whatever that the county court judge is bound to inquire into and adjudicate upon the question whether the debtor carries on business in London or not, if necessary for the purpose of the proceedings before him. From his decision on the point, if wrong, an appeal would lie under the previous section. Looking, therefore, to all the provisions of the Act as a whole,—to the fact that it is absolutely imperative on the judge to entertain a petition which is good on the face of it, and that it is obviously necessary that he should determine for himself, to the best of his judgment, in the first instance, on the truth of the allegations of the petition, and among them, where the fact is disputed, whether a debtor carries on business in London or not, and that from a wrong decision on any such question there is a remedy provided by way of appeal,—I am clearly of opinion that there was no absence of jurisdiction in this case, and the judge was bound, if satisfied with the proof before him, to pronounce the debtor a bankrupt. I have come to this conclusion without the aid of the 10th section, but with its aid the matter becomes still clearer. That section enacts that a copy of the *Gazette* containing the order of adjudication shall be conclusive evidence of the debtor's having been duly adjudged a bankrupt.

The only remaining question is, whether, the adjudication not

having been made against the bankrupt as a trader, and not describing him as such when, in point of fact, it afterwards turned out that he was a trader, the 87th section is applicable to the case. According to the literal construction and the plain meaning of the words of the section themselves, it seems to me that all that is necessary to make it applicable to the case is that the bankrupt should be a trader in fact. It is contended that the words "upon notice being served on him within that period of a bankruptcy petition having been presented against such trader," shew that the adjudication must be against the debtor as a trader. And it is further urged, that the form of the adjudication is different in the case of a trader from that in the case of a non-trader. There is a difference, no doubt, in the description of the bankrupt, but that is all. The adjudication adjudges the debtor to be a bankrupt, and that is all. There is no difference in point of form which affects the application of this section. Neither do I find anything in the section that says the adjudication must be against the bankrupt "as a trader;" it simply says, "where the goods of any trader have been taken in execution," &c. Here the bankrupt was a trader, and his goods were taken in execution. It therefore seems to me that all the requisites of the section existed in this case.

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MARTIN, B. I am of the same opinion, on the ground that the defect in the proceedings of the county court amounted merely to an irregularity, and not to an absence of jurisdiction. The county court judge ought not to have done what he did if he had known all the facts; but on what he did know he acted rightly. To hold that in such a case the proceedings were a nullity would involve that the trustee and all the parties concerned would be liable to an action as trespassers, and the consequences would be such as to render it impossible to carry the Act into execution. The 66th section enacts that every judge of a local court of bankruptcy shall have all the powers and jurisdiction of a judge of the Court of Chancery. In the present case such a judge has a case brought before him, apparently within the Act, and adjudicates accordingly. According to the argument, because it turns out afterwards that the bankrupt carried on business in London in an assumed name, it must follow that the parties proceeding in the

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bankruptcy are all trespassers. If that be so, no one would dare to proceed under the Act at all. The mistake in the argument seems to me to lie in assuming that, because an order is made, which if all the facts were known ought not to have been made, therefore it follows there was a want of jurisdiction. The 81st section expressly provides that the consequences I have pointed out shall not follow where a bankruptcy is annulled; but this case would not be within that section, for it would not be necessary, according to the argument, to annul the bankruptcy, and so there would be no protection. It would be contrary to all reason that the order of adjudication should be a nullity in such a case as this. It may be wrong, and may be set aside, but as long as it exists it is not void. With regard to the question whether the 87th section applies, that section says "the goods of any trader," not the goods of any person who has been adjudicated bankrupt as a trader. Here the goods are the goods of a trader, and it therefore seems to me that the section applies.

BLACKBURN, J. I am also of opinion that the judgment should be affirmed. I will first consider the point as to the applicability of the 87th section. The argument was that the section only applied where the adjudication was against the debtor as a trader. It appears to me that the question whether the section is applicable depends on whether the bankrupt is de facto a trader or not, and not on whether he was adjudicated a bankrupt as a trader or not. Looking to the whole of the Act, I think it is pretty clear that there is no such thing as a petition or adjudication against a trader as a trader. The scheme of the Act is that all debtors may be made bankrupt if liable to be so. With respect to the acts of bankruptcy there is a distinction no doubt; but still the effect of adjudication is to adjudge a debtor who has committed an act of bankruptcy a bankrupt, without reference, so far as the adjudication is concerned, to whether he is a trader or not. With respect to the consequences of adjudication, there is a difference according as he is or is not a trader. The reputed ownership clauses, the provisions as to marriage settlements, the provision at present in question, and various other provisions, make a difference between traders and non-traders. But I have searched the Act in

vain for anything to shew that the fact of the petition and adjudication having been against a man as a non-trader, makes any difference if he afterwards turns out to be a trader with respect to the consequences above referred to. The 8th section provides that proof shall be given of the trading, if necessary, which I take to mean if the act of bankruptcy is one peculiar to traders. So also with respect to the statutable form of petition. If the act of bankruptcy be one that would be an act of bankruptcy in the case of any debtor, there is no need to say anything about trading; but in the case of an act of bankruptcy which is only one as against a trader, it is necessary to prove that the debtor is a trader, for otherwise there would be no act of bankruptcy. Accordingly the note to the form directs that, where necessary, an allegation should be added that the debtor is a trader. So also with respect to the form of the adjudication. It is not an adjudication against the bankrupt as trader or non-trader, and it is only necessary to refer to the trading as having been proved where necessary, i.e., when the nature of the act of bankruptcy renders it necessary. It seems to me to be a fallacy to suppose that there is any difference between the petition or adjudication as against a trader and a non-trader. If the debtor is adjudged bankrupt, he is a bankrupt without reference to whether he is a trader or not. Different consequences follow according as he is a trader or not; but the adjudication is the same. It seems to me that justice and expediency point to this conclusion, for it would be very unreasonable that, if the debtor had been adjudged bankrupt as a non-trader, and it were afterwards discovered that he was a trader, it should be necessary to commence the proceedings over again. If, therefore, I am correct in my view, the 87th section applies in this case, seeing that the bankrupt was, in point of fact, a trader.

We now come to the other point which turns on the 59th section. That section appears to me to be somewhat unfortunately worded, and if it were to be taken literally, no small inconvenience might be caused in the application of the other sections of the Act in many cases. It happened that, in the present case, the petition was presented where the debtor resided, the parties being ignorant of the fact that he also carried on business in London. Mr. Benjamin did not press the suggestion that the adjudication was procured by

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fraud which there is authority for contending might invalidate any proceeding; and for the proposition that any legal proceeding founded on an untrue statement is void no authority was cited, and I do not know of any. It was thought by Brett, J., in the Court below, that the county court could only have jurisdiction if the debtor resided within the district and did not reside or carry on business in the London district. And it was argued, that the general rule applied to this case, which is applicable to inferior courts with a limited jurisdiction, viz. that where such court exceeds the limits of its jurisdiction, the proceedings are void, and may be shewn to be so in any collateral proceeding. If it were so, and the local courts of bankruptcy were inferior courts, these consequences might follow, however inconvenient they might be. I do not, however, think that such is the effect of the Act. By the 6th subsection of the 80th section, "every court having original jurisdiction in bankruptcy shall be deemed to be the same court, and to have jurisdiction throughout England." The Greenwich Court had original jurisdiction in bankruptcy, and it is impossible to read this section except as meaning that every local court of bankruptcy is to be considered as a branch or portion of one and the same court. It is enacted that the London Court is to be a principal court of record, and that the judge of every local court is to have the jurisdiction of the Court of Chancery. Reading these sections together, I can come to no other conclusion than that the local courts are branches of this principal Court of record, and so must be treated as courts of general jurisdiction, and we cannot treat a judgment of one of them as a nullity, but must leave it to be matter of appeal. The 71st section strongly confirms this view to my mind, inasmuch as it contains very ample provision for appeals. What the consequences of an appeal might be in such a case as this to the party aggrieved it is unnecessary for us to consider. The 10th section provides "that a copy of the *Gazette* containing the order of adjudication shall be conclusive evidence of the bankrupt's having been duly adjudged a bankrupt." I think the intention was, that the order of the Court of Bankruptcy should not be open to question in collateral matters, as for instance an action by the trustee against an alleged debtor to the estate, or criminal proceedings in respect of any of the offences under the

bankrupt laws. It seems to me that if, notwithstanding this general intention, the effect of s. 59 was, that such a question as the present might be brought forward in any case, and it would be open to us to inquire into it, the legislature would have been guilty of a most obvious omission. But if the county court were a branch of a superior court, or a principal court of record, as this Act calls it, there is no reason why this judgment should not be binding on us until it is reversed.

It is not necessary for us to say what the judge of the Court of Bankruptcy would do in such a case on appeal. In the case of *Re Buckland* (1), he appears to have thought that he had jurisdiction to transfer all the proceedings, treating what had already taken place as valid. And it is to be hoped that he was right, for that would be the most convenient course. If that be so, the effect in this case, had there been an appeal, would have been merely to transfer the proceedings, and the appellant would not have gained his object.

CLEASBY, B. I am of the same opinion. We have, it seems to me, three questions to consider: first, whether the adjudication was unavailable on account of the conduct of the petitioning creditor when it was procured; secondly, whether it must be treated as void because the county court ought not to have made it; and, thirdly, whether s. 87 applies, the bankrupt not having been adjudicated such as a trader. It does not appear to me that the first question is really open upon the terms of the leave reserved. If this objection was to be raised it ought to have been distinctly taken in such a form as that the opinion of the jury on the facts with reference to it might have been obtained. On the second question I entertain no doubt whatever. On turning to form 10 and rules 36, 37, and 38, it will appear clear that the matter was for the county court judge to determine, and that it must have been brought before him for adjudication and adjudicated upon. The form of petition states, among other allegations, that the debtor does not reside or carry on business in London. Notice is to be given to the party petitioned against that the petition will be heard at such a time, and that if he intends to dispute any matter he must

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file a notice with the registrar and send a copy of the affidavit to the petitioning creditor, and if he does not raise any dispute the allegations will be taken to be proved by the petition verified by affidavit. It therefore appears that the judge is to take all the facts before him into consideration, and is entitled to act on an affidavit which the party concerned had an opportunity of answering. When we refer to rules 36, 37, and 38, we find this view confirmed, and that if the debtor does not appear the court may consider the allegations of the petition proved and proceed to make an adjudication; but if there be an application on the part of the debtor to dispute the petitioning creditor's debt or any other matter essential to the validity of the adjudication, then the court must inquire into the truth as to the matter disputed, and has power to examine witnesses, and all other powers necessary to determine such matter. It is clear therefore, as it appears to me, without calling in the aid of the 72nd and 80th sections, that the whole matter was for the County Court of Greenwich to determine, and that a wrong decision of such court was a matter of appeal. The only other question is whether the 87th section is applicable. I had some doubt on the subject but it is now entirely removed. It does not seem to me to be necessary that the adjudication should be against the debtor in any particular character. It seems to me that the section is applicable by reason of the goods being in fact those of a trader and not of the petition or adjudication being in any particular form.

QUAIN, J. I am of the same opinion, and on this short ground. Reading the 59th and 66th sections of the Act, and the 6th subsection of s. 80 together, I come to the conclusion that there is no want of jurisdiction in the present case, but merely an irregularity in the exercise of it. The 6th subsection of s. 80 is very strong to shew this. By that all the local courts are to be considered as the same court, and to have jurisdiction throughout England. When the 59th and 66th sections are taken in conjunction with this provision it appears to me clear that the intention is that all the courts are to be branches of the same Court of Bankruptcy, the business being divided among them according to certain limits for the convenience of business, and consequently the taking pro-

ceedings in the wrong court is merely a matter of irregularity which may be adjusted by the court itself. The only remaining question is whether s. 87 applies. At first I had some doubts as to this, but looking to the terms of the section taken in conjunction with the rest of the Act, I am of opinion that it is not essential that the adjudication should be against the debtor as a trader except where the act of bankruptcy alleged is peculiar to traders.

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ARCHIBALD, J. I also am of opinion that the judgment should be affirmed. I think the County Court of Kent had jurisdiction on presentation of a petition containing all the allegations essential to an adjudication of bankruptcy to entertain the petition and inquire into and determine the truth of such allegations, and that therefore, so long as the adjudication stands unreversed, we cannot treat it as a nullity. The 10th section expressly makes it conclusive. The only other question is as to the applicability of the 87th section, and it was argued that the section only applies to the case of an adjudication against the debtor as a trader. I have carefully considered the words of the section, and without repeating the reasons already given by the rest of the Court, I have come to the conclusion that there is nothing in the Act which renders it necessary that the petition or adjudication should be against the debtor as a trader, except when the act of bankruptcy is one peculiar to traders. That being so, the adjudication must have its effect as such, and the consequences of it will depend on the fact of the debtor being a trader or non-trader, and not on the form of the adjudication.

Judgment affirmed.

Attorneys for plaintiff: *Brooksbank & Galland.*

Attorney for defendant: *Rae.*

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June 20.

[IN THE EXCHEQUER CHAMBER.]

PEARSON *v.* THE COMMERCIAL UNION ASSURANCE COMPANY.*Insurance on Ship against Fire—Construction of Policy—Place in which Policy attaches.*

1000.674 A fire policy was effected for a certain period of time, on a steam-ship lying in the Victoria Docks, London, with liberty to go into dry dock. The ship was taken up the river, some distance from the Victoria Docks, to the nearest available dry dock; but in order that she might be able to enter the dry dock it was necessary to remove part of her paddle-wheels. This was done in the Victoria Docks. Her repairs being completed, she was taken out of the dry dock and moored in the river at a place a few hundred yards higher up than the dry dock, where she remained ten days, for the purpose of having her paddle-wheels replaced before returning to the Victoria Docks.

Whilst so moored she was destroyed by an accidental fire. It was proved to be usual to remove the paddles of large steamers to enable them to go into dry dock, and that the time occupied in the river in replacing them in this case was not unusual or unreasonable:—

Held (affirming the decision of the Court below), that the policy only attached upon the vessel whilst in the Victoria Docks, or in the dry dock, or in the river for the purpose of going to and returning from the dry dock, and not during her stay in the river for a different purpose, and consequently the insurers were not responsible for the loss.

Affirmed by H of L 10th Cas 498
 APPEAL from the decision of the Court of Common Pleas, making absolute a rule for a nonsuit, reported 15 C. B. (N.S.) 304; 33 L. J. (C.P.) 85, where the facts are fully stated.

Watkin Williams, Q.C. (with him *Lanyon*), for the plaintiff. The policy was a fire policy, upon the ship while lying in the Victoria Docks, with liberty to go into a dry dock. It is clear that the policy was intended to cover the ship, not only in the Victoria Docks and the dry dock, but also on her way to and from the dry dock. It is just as if the policy was on a voyage for the distance. Then could it be said that there was what amounted to a deviation? It is found that it was necessary, to enable her to go into the dry dock, that half of her paddles should be removed, that it was usual to remove the paddles in such cases, and that the delay in the river after she had come out of the dry dock, for the purpose of replacing them, was only for a usual and reasonable time.

(11) 50 10 June N.S. 517

It is not merely because the place she went to for the purpose was not on the direct way from the dry dock to the Victoria Docks that there would be a deviation; it might be reasonable and proper for her to go there on the ground that she would be more out of the way, or that the replacing of her paddles could be more easily and inexpensively done there.

[MARTIN, B. This is not a question of deviation at all; but whether the place where the vessel was is within the terms of the policy.]

It is not denied that the policy covers her cundo, morando, et redeundo. Can it be as a matter of law that if she were moored for an hour or two at some place a little way out of the direct geographical course between the dry dock and the Victoria Dock, and the loss occurred there, that this would not be covered by the policy? If it once becomes a matter of degree, is it not for the jury to say whether she might not be fairly considered as on her way from the dry dock to the Victoria Dock? This delay was, it is contended, a usual incident of going into dry dock and returning therefrom.

[BLACKBURN, J. There would seem to be this distinction between an ordinary voyage policy and a fire policy of this sort. That in the former case a deviation destroys the policy, whereas, in the latter case, there seems no reason why the goods should not be taken out of the place to which the policy attaches, and so cease for a time to be covered, and then brought again into it, when the policy would again attach.]

[He cited *Bouillon v. Lupton*. (1)]

Benjamin, Q.C. (with him *Cohen* and *Cowie*), for the defendants, was not called upon.

KELLY, C.B. I am clearly of opinion that the judgment should be affirmed. This is not the case of an insurance on a voyage, but an insurance against fire on the ship for a certain period of time, in certain specified places. It is an insurance on the ship first of all in the Victoria Dock, and it is clear that if the policy had stopped there, and the fire had taken place while the vessel was moored in the Thames, for purposes however usual, the policy

(1) 15 C. B. (N.S.) 113; 33 L. J. (C.P.) 37. *10 June 1873 NS 422*

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would not have attached. But it is further provided that the ship may go into a dry dock, and the insurance is to continue while she is in the dry dock. Those are the two places which are specified as being those in which the ship is to be insured against fire; but it is not using great latitude in construction to say that it is intended that the policy shall attach during the short period of time which is necessarily occupied while she is passing, without undue delay, from the Victoria Dock to the dry dock and returning, and that the ship shall be also insured against fire in the place through which the ship must go on such passage. That, however, seems to me the utmost extent to which the policy can be carried. But here the vessel, instead of returning direct and without unnecessary delay from the dry dock to the Victoria Dock, not only went further up the river some distance—to which fact I do not attach so much weight, because it might possibly be necessary and proper under particular circumstances in the course of her return, as for instance, if, the river being too much crowded or blocked up for her to proceed immediately, it were a more convenient place for the purpose of waiting at out of the way;—not only, I say, did she go further up the river, but instead of proceeding at once to return she was moored in the Thames, off Deptford, for ten days, in order to replace the paddle-wheels. If the parties had contemplated an insurance on the ship in the Thames, they would have said so. It appears to me that we should be increasing the risk, and applying it to a place not within the terms of the policy, if we held that the insurance covered such a case as this. It was urged that the purpose for which the vessel was delayed in the Thames was a usual and reasonable purpose. That may very well be, but if the parties intended that the vessel should be covered by the insurance while moored in the Thames for any usual purpose, on her return from the dry dock, they should have used expressions to that effect in the policy.

MARTIN, B. I am of the same opinion. I do not think that the doctrine of deviation has anything to do with this case. The insurance is for a limited time on a vessel in certain places, and we must look to the words used in the policy to determine what those places are. It seems to me that the ship was only insured while in

the Victoria Dock or the dry dock, or on her way to and fro between the two. I do not think that she was, properly speaking, on her way between the two when the fire occurred.

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BLACKBURN, J. I am of the same opinion. I do not think this is like the case of a voyage policy at all. The ship was insured while in the Victoria Dock or the dry dock, and probably while on her way between the two, going or returning. She was, when lost, moored in the Thames, for purposes no doubt very usual and proper, but if the parties wished to cover the risk, while she was so moored, they should have provided for it by appropriate words in the policy.

CLEASBY, B. I am of the same opinion. I do not think the words of the policy cover the contingency which has occurred; and it is easy to see why there should be no provision as to such contingency, for it is obvious that the parties would not be likely to contemplate it, inasmuch as it is stated that the difficulty arising from the size of the paddle-wheels was not discovered till after the policy was effected.

QUAIN and ARCHIBALD, JJ., concurred.

Judgment affirmed.

Attorney for plaintiff: *Cotterill*.

Attorneys for defendants: *Thomas & Hollams*.

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July 7.

CATOR AND OTHERS v. THE GREAT WESTERN INSURANCE COMPANY OF NEW YORK.

Marine Insurance—Sea Damage to Part of Goods insured—Consequent Depreciation in Value of Remainder.

A policy of marine insurance was expressed to be "on 1711 packages teas, valued at the sum insured, viz., \$31,000," and contained a special warranty in the following terms, viz., "warranted by the assured free from damage or injury from dampness, change of flavour, or being spotted, discoloured, musty or mouldy, except caused by actual contact of sea-water with the articles damaged occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise, and the same practice shall obtain as to all other merchandizes so far as practicable."

The ship met with bad weather and shipped large quantities of sea-water, by contact with which 449 packages of the tea insured were greatly injured.

When teas are sold they are usually sold in the order of the consecutive numbers marked on the packages, and if the numbers be broken by some being omitted, or if some of the chests be marked as damaged, a suspicion is created that the other packages may be damaged, and they do not command such high prices as if none of the shipment had been damaged. In consequence of this the remaining 1262 packages, which had not been in contact with sea-water, sold for less than they would otherwise have fetched:—

Held, that the assured could only recover in respect of the damage occasioned to the packages which had been actually in contact with sea-water, and not in respect of the loss occasioned by injury to the reputation of the remainder: and, *semble*, that the effect would have been the same even in the absence of the special warranty.

DECLARATION. 1st count. Upon a policy of marine insurance effected by the plaintiffs with the defendants upon 1711 packages of tea, averring that the goods insured were damaged by the perils insured against, but that the defendants would not pay the amount of the loss. 2. Money counts.

Plea, payment into Court of 660*l*.

Replication: Damages ultra.

Issue.

The trial took place before Bovill, C.J., at the sittings in London after Trinity Term, 1872. The facts as proved at the trial sufficiently appear from the judgment. The verdict was entered for the defendants, leave being reserved to the plaintiffs to move to enter a verdict for themselves for an amount to be after-

wards ascertained by arbitration, on the ground that the plaintiffs did sustain damage beyond the amount paid into Court by reason of depreciation and injury to the whole parcel of tea by actual contact of part of the tea with sea-water, and that on the true construction of the policy the plaintiffs were entitled to recover damages, the Court to draw inferences of fact.

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A rule nisi had been obtained accordingly, against which

Jan. 22, 23. *C. Russell, Q.C., Benjamin, Q.C., and Cohen*, shewed cause. Admitting that the insurance must be treated as one insurance made upon the parcel of teas as a whole, not as a separate insurance on each parcel, the question is whether the underwriters are bound to pay for depreciation in value of the part undamaged by sea-water by reason of the damage done by sea-water to the other part. It is submitted that the underwriters are expressly exempted from liability to bear loss so occasioned by the terms of the policy. The damage insured against is restricted to damage arising from actual contact of sea-water.

[BRETT, J. But if the whole parcel of teas is to be regarded as an entirety, is not this a damage occasioned by actual contact with sea-water?]

The words are "actual contact of sea-water" not with the subject-matter of insurance, but with the articles damaged.

[BRETT, J. What do the words "articles damaged" mean; the individual packages or the whole subject-matter of insurance as damaged by the damage done to part?]

It is clearly not meant to include mere damage to the reputation of part of the teas. The clause was intended to obviate the effect of the decision in *Montoya v. London Assurance Co.* (1); see 1 Parsons on Marine Insurance, p. 546, and cases there cited, as to the meaning and effect of such a clause. The clause as to separation of packages in the case of dry goods, &c., though not directly applicable, has an important indirect bearing on the meaning of the clause as to actual contact with sea-water. If it were intended the packages should be divided if divisible, à fortiori it could not have been intended that where the subject-matter of insurance was in separate packages it should be treated as one and indivisible.

(1) 6 Ex. 451; 20 L. J. (Ex.) 254.

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Secondly, it may be contended that for the present purpose this is not an entire insurance on the whole number of packages, but an insurance on each separately. When several things are insured the fact that the valuation is of all together, does not make it an insurance of all as a whole, the things being by nature distinct and separate. It is not like an insurance on grain in bulk: Benecke, p. 474; Arnould, 2nd ed. p. 830; Stevens, pp. 155, 158.

[BRETT, J. Is not the case of *Ralli v. Janson* (1) a distinct authority against this contention?]

That case was decided with reference to the effect of the memorandum. It is submitted that different considerations apply to the present question. Admitting that the doctrine of *Ralli v. Janson* (1) and *Entwisle v. Ellis* (2) applies for the purposes of the memorandum, and that for such purposes the insurance is one and not a separate insurance on each package, it does not follow that the subject-matter of insurance is one and indivisible, so that damage to a part is damage to the whole. Some articles are by nature divisible and some are not. This is not like a machine consisting of various parts, and damage to a part of which may destroy the value of the whole. It is submitted that, apart from the special clause in this policy, and treating the policy as an ordinary Lloyd's policy, the damage could not be recoverable because it is not a damage proximately occasioned by perils of the sea. The damage occasioned by the perils of the sea to the subject-matter of insurance must be estimated by looking at the damage occasioned by sea-water to the part damaged. The damage to the rest is not sea damage at all; it is damage occasioned by another element altogether, viz. a mere prejudice or opinion, reasonable or unreasonable, in the mind of the trade.

[They also cited *Rosetto v. Gurney* (3), and *Thompson v. Hopper*. (4)]

Sir J. B. Karlake, Q.C., and *Watkin Williams*, supported the rule. The clause of the policy relied on by the defendants does not apply.

(1) 6 E. & B. 422; 25 L. J. (Q.B.) 300.

(2) 2 H. & N. 549; 27 L. J. (Ex.) 105.

(3) 11 C. B. 176; 20 L. J. (C.P.) 257.

(4) 1 E. B. & E. 1038; 27 L. J. (Q.B.) 441. *See H.S. 93.*

It is confined to such a case as that of *Montoya v. London Assurance Co.* (1), and was intended to meet a case where damage is really caused to one article by its proximity to another rendered putrid or damaged by the sea. So far as the present question is concerned the policy is the same as an ordinary Lloyd's policy. It is clear from *Ralli v. Janson* (2) that this is one entire insurance of the whole of these teas. It is likewise clear as a fact that the whole package has, commercially speaking, been damaged by the effect of perils of the sea. If it were sold as a whole it would be worth so much less as a whole by reason of the damage. The parcel was physically divisible, but commercially it was not divisible for the purpose of the damage, for the fact of the damage to part necessarily affected the value of the rest.

[BRETT, J. If the different packages had been separately valued, could the assured have recovered in respect of the consequential damage to the packages that were untouched?]

In that case there would be a distinct independent insurance on each package. This is not the case here, nor is it like the case of an assortment of goods of different kinds included in one insurance, when, in considering the amount of a partial loss, each species of goods must be considered separately, and where the loss of one article may occasion the failure of the speculation quite independently of sea damage: see Benecke, p. 437, et seq.; Arnould, 2nd ed. p. 989. Here there is an insurance of one species of goods of such a nature that if part is damaged by actual contact of sea-water, the rest is necessarily damaged in a commercial point of view. It may be compared to a set of volumes of reports; if one is damaged by actual contact with sea-water it lessens the value of the whole set. If damage by sea-water was not the cause of the depreciation in value of the remainder of the tea, what was the cause? It is not alleged that there was any other cause.

[BOVILL, C.J. The cause is a prejudice reasonable or unreasonable in the minds of commercial men.]

If there be a prejudice necessarily created in the minds of all commercial men, is not this commercially speaking a loss? Tea is an article of so peculiar and delicate a nature that it is practically impossible to calculate the exact amount of the damage in such

(1) 6 Ex. 451.

(2) 6 E. & F. 422.

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cases, and consequently the value of the whole is depreciated. Further, it is contended that there having been a fall in the market value of tea between the arrival of the ship and the sale of the tea, the proper mode of calculating the loss on the damaged tea was by comparing the value of tea at the time of the ship's arrival and the value at the time of the sale, because the delay in selling was itself a direct consequence of the teas arriving in a damaged condition. If so, the amount paid into Court is insufficient.

[They also cited *Lewis v. Rucker* (1); *Duff v. McKenzie* (2); *Wilkinson v. Hyde*. (3)]

Cur. adv. vult.

July 7. The judgment of the Court (Bovill, C.J., and Keating and Brett, JJ.) was delivered by

BOVILL, C.J. The policy in this case was "on 1711 packages teas," by the *Eurydice*, at and from New York to London, valued at the sum insured, viz. \$31,000, and after enumerating the usual perils covered by the insurance, contained the words "and all other losses and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes, or any part thereof, occasioned by sea perils." There was a special warranty in the following terms:—"Warranted by the assured free from damage or injury from dampness, change of flavour, or being spotted, discoloured, musty, or mouldy, *except caused by actual contact of sea water with the articles damaged, occasioned by sea perils*. In case of partial loss by sea damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of *the portion only of the contents of the packages so damaged, and not otherwise*; and the same practice shall obtain as to all other merchandize, as far as practicable."

The term "dry goods," it was agreed on the argument, would not include or apply to tea.

There were also special warranties against partial loss or particular average under 5 per cent., and other special warranties against average as to different goods, unless general or over a

(1) 2 Burr. 1167, 1171.

(2) 3 C. B. (N.S.) 16; 26 L. J. (C.P.) 313.

(3) 3 C. B. (N.S.) 30; 27 L. J. (C.P.) 116.

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certain rate per cent.; and then came the following clauses: "On risks from China, each ten packages of silk or other dry goods in the order of invoice subject to separate average. Each interest of \$5000 insured value, or less, subject to separate average. If over \$5000 value, each of the following kinds of teas, imperial gunpowder, hyson skin, young hyson, and black teas, and each \$5000, value thereof in the order of invoice, subject to separate average; and the different excesses over \$5000 subject to average if the damage amount to \$250."

The declaration averred that the goods were damaged, injured, and lost by the perils insured against.

This tea formed a portion only of the cargo of the *Eurydice*, which was loaded as a general ship.

In the course of the voyage the vessel met with bad weather, and shipped large quantities of sea-water, by which various portions of the cargo were damaged, and amongst others 449 packages of this tea, which were stowed in different parts of the ship, were greatly injured by contact with sea-water; the remainder of the teas, viz. 1262 packages, arrived in a perfectly sound and good condition, and uninjured, except by the injury to their reputation from having formed part of a shipment of which 449 packages had been damaged by sea-water. The full amount of the damage to the 449 packages was paid into Court.

The shipment consisted of several different kinds of tea, each of which was distinguished as a chop of a certain name and mark; and all the chests were numbered consecutively. There were altogether ten different chops, and which at the sale were divided into thirty-five breaks. The 449 packages that were damaged by sea-water were portions of different chops, and formed parts of the series of consecutive numbers on the chests.

When teas are sold, they are usually sold in the order of the consecutive numbers marked on the packages; and, if the numbers be broken by some being omitted, or if some of the chests are marked as damaged, a suspicion is created that the other packages may be affected, and those other packages, though perfectly sound and uninjured, do not realise so high prices as they would have done if none of the packages had been damaged.

In the present [instance, the teas were sold in the usual way;

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but, in consequence of the suspicion created by the damage to so large a number as 449 packages, and the prejudice arising from that circumstance to the rest of the teas, the 1262 sound chests did not fetch so much as they would have done if the 449 had not been damaged by sea-water; and the difference in price upon the 1262 sound chests from this cause amounted to a very considerable sum, which was to be settled by an arbitrator, if necessary. The plaintiffs sought to recover this sum as a loss which was caused by the perils insured against, and contended that the whole shipment was to be considered and treated as one entire subject-matter.

The defendants, on the other hand, contended that they were liable only for such of the packages, viz. the 449, as were in fact damaged by sea perils; that, for the purpose of ascertaining such damage, the packages must be considered as divisible; and that injury to the reputation of the teas from suspicion only, when the teas were in fact sound and had not been injured, was not a matter covered by the policy.

There were other questions raised at the trial, but which from the findings of the jury have now become immaterial. The Court were to draw such inferences of fact as the jury should have drawn.

The case was argued very elaborately, and with considerable ability: but the plaintiffs failed to produce any authority to shew that goods which arrived perfectly sound and uninjured could be deemed to be damaged or injured by sea perils. The strongest case in their favour was *Montoya v. Royal Exchange Insurance Co.* (1), where hides and tobacco having been insured, and shipped in the same vessel, which sustained damage, the sea-water had affected the hides, and caused them to ferment and decompose, and the stench which was thus created had affected the flavour and consequently the value of the tobacco. In that case, the tobacco itself was actually injured; and the only question was whether the injury arose proximately from the sea-water; and it was held that it did, and that the underwriters were therefore liable for the actual damage to the tobacco. But the present case seems to us to be distinguishable, on the ground that here there was no damage whatever to the 1262 packages of tea, which arrived perfectly sound and untouched, and altogether unaffected by the sea-water.

(1) 6 Ex. 451; 20 L. J. (Ex.) 254.

The insurance is against damage to the goods, and not against loss to the assured otherwise than by reason of damage to the goods themselves. The plaintiffs, however, contended that the whole 1711 packages must be treated as one indivisible and entire subject-matter, so that a damage by the perils insured against to any part of them would be an injury to the whole, if it affected the value of the whole. It seems to us that this contention is not borne out. A shipment of this kind is not like an entire article, such as a machine, where, one part being injured or destroyed by sea perils, the machine itself becomes changed in character and value, and comparatively useless. The underwriters insure against damage to the goods by the perils insured against; but they do not, in our opinion, insure against damage by prejudice or suspicion, though such prejudice or suspicion be reasonable and be general in fact in business, when there is no damage in fact to the goods themselves; and, if this policy were to be so construed, it would make them insurers, not only against direct damage to the goods insured, but against damage to other goods in the same ship affecting the credit and thereby the value of the goods insured, and would create indirect and collateral and consequential liabilities from suspicion and prejudice, which it would be almost impossible for the underwriters to estimate in fixing a premium proportionate to the risk.

In *Duff v. Mackenzie* (1), it was held that, under a policy on "master's effects valued at 100*l.*, free from all average," the insurance must be treated as divisible, and that the master might recover for a total loss of part of his effects, although the whole were included under the general term "effects." So, in *Wilkinson v. Hyde* (2), where the insurance was for "240*l.* on goods so valued, against total loss only," the goods were considered as divisible, and the assured was held entitled to recover for a total loss of part of the goods.

The case of *Ralli v. Janson* (3) was much relied upon by the defendants: but the decision there turned entirely upon the terms and effect of the warranty in the memorandum against average

(1) 3 C. B. (N.S.) 16; 26 L. J. (C.P.) 313. (2) 3 C. B. (N.S.) 30; 27 L. J. (C.P.) 116. *See N.S. 482*

(3) 6 E. & B. 422; 25 L. J. (Q.B.) 300.

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unless general; and it was held that the memorandum was intended to include the whole of the particular species of goods, viz. seed, whether shipped in bulk or in packages; that decision does not, in our opinion, govern the present case.

The insurance here is on 1711 packages valued at one sum; and, if each package had been separately enumerated, it would scarcely have made them more distinct. Even if they had been insured simply as "tea," or as "goods," if they were in fact contained in separate packages, we should still have thought that, for the purpose of calculating or ascertaining the extent of the sea damage, they would be divisible, and that the plaintiffs could have recovered only in respect of the damage done to those packages which were actually damaged by sea perils.

The special terms of the present policy, however, seem to us to be still more favourable for the underwriters than the terms of an ordinary policy. It expressly excludes direct actual damage or injury from dampness or change of flavour, &c., except caused by actual contact of sea water with the article damaged, occasioned by sea perils; and it could scarcely, therefore, have been intended that the underwriters should be liable for what was not actual damage, but mere suspicion, and so indirectly an injury, not to the goods, but to the pecuniary interests of the assured. After providing that, in case of partial loss by sea damage to dry goods (which does not include tea), cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise, the policy goes on to provide that the same practice shall obtain as to "*all other merchandize as far as practicable.*" These last terms would, in our opinion, include the tea in question, and tend strongly to shew the intention was that the subject-matter of the insurance was not to be treated as entire and indivisible. It might well be contended that the language of the policy would seem to indicate that, not only each package was to be treated separately, but that even the contents of each package might be separated so as to confine the loss to the exact portions of tea that were actually damaged by sea perils. The defendants, however, have not relied upon this last construction of the warranty, but have paid into Court the full loss upon the 449 packages, without

attempting to separate the contents of each of these packages. The special average warranties, at different rates, on different kinds of goods, and the differences of classification and average in this policy seem also to shew that it was never intended that the 1711 packages should be treated as one entire and indivisible subject-matter of insurance; and, if not, then there is no practicable division of the packages, except by treating each package as a separate article.

The whole shipment consisted of several different kinds or chops of tea; and, could it have been successfully contended that, if only half the chests in any particular chop had been damaged or lost, and the consecutive numbers of the chests in that chop thereby interfered with, each chop could be considered as a separate subject-matter of insurance, and that the plaintiffs could have recovered for the injury to the reputation and consequent loss in price of the rest of the chests in that chop? Or, suppose the policy had been on 1711 packages of tea at one valuation "by ship or ships," and part had come in one vessel and part in another, could it have been said that sea damage to the packages in one ship, whereby the continuity of the numbers was destroyed, was an injury to the packages in another ship, which sustained no damage? and yet there would be an injury by suspicion and to the reputation of the teas by the numbers not being consecutive, and caused remotely by sea perils.

If such a claim as this could be supported, it might next be contended that the underwriters would be responsible if the reputation and value of sound teas were affected by serious damage to the ship, or to other persons' goods in the same ship which were damaged by sea water, or for the loss of markets by delay through the perils of navigation.

It appears to us that the underwriters insure against actual damage, and do not in any sense guarantee that the goods shall arrive free from suspicion of damage. In like manner, a ship-owner was held to guarantee only the fitness of his vessel for a cargo of tea, but not that the ship should be free from *suspicion* of unfitness for such a cargo: see *Towse v. Henderson*. (1)

Each package of this shipment was separate, and in fact as

(1) 4 Ex. 890; 19 L. J. (Ex.) 163.

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distinct and separate from the others as if it had contained a different article,—each might and would be subjected to different risks according to its position and stowage in the vessel; and, where the packages are severable, they ought to be severed. As far as we are aware, the practice in such cases has been to separate the sound packages of goods from those which are damaged, and to allow the claim for damage upon those only which are actually damaged by the sea perils. That practice is supported by the passages which were cited from Mr. Arnould's valuable work on Insurance, 3rd ed. p. 836, and the authorities to which he refers; and Mr. Stevens, in his book upon Averages, at pp. 157, 158, clearly considered that a consequential loss upon goods which arrived sound, by reason of the breaking of an assortment, was not a loss for which underwriters were responsible, there being no actual damage done to the goods themselves. In our opinion that is the correct view of the law.

A further point was raised by Mr. Williams at the close of the case, as to the fall in the market-price after the arrival of the vessel and the valuation of the damaged teas, and before the actual sale of them. But the underwriters have nothing to do with the mode or time of sale, and are not responsible for a fall in the market-prices: their liability depends on the value of the goods upon arrival; and the defendants have paid into Court the full amount for which they are liable upon that footing.

Upon the true construction of the policy, we think the plaintiffs are entitled to recover only in respect of the 449 packages which were actually damaged; and, as the amount of that damage has been paid into court, our judgment is in favour of the defendants.

Judgment for the defendants.

Attorneys for plaintiffs: *Thomas & Hollams.*

Attorneys for defendants: *Field, Roscoe, Field, Francis, & Osbaldiston.*

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Master and Servant—Liability of Master for Negligence of his Servant—Scope of Employment.

July 7.

A stevedore employed to ship iron rails had a foreman whose duty it was (assisted by labourers) to carry the rails from the quay to the ship *after* the carman had brought them to the quay and unloaded them there. The carman not unloading the rails to the foreman's satisfaction, the latter got into the cart and threw out some of them so negligently that one fell upon and injured the plaintiff, who was passing by:—

Held, (per Grove and Denman, JJ., Brett, J., dissenting), that there was evidence for the jury that the foreman was acting within the scope of his employment, so as to render the stevedore responsible for his acts.

ACTION against the defendant for an injury to the plaintiff through the negligence of the defendant's servant. At the trial before the assessor of the Court of Passage, Liverpool, the following evidence was given:—

The plaintiff stated that he was in the employ of Messrs. Davis & Co., and was engaged at the Huskisson Branch Dock, where some carts were being unloaded; that Lawrence Malone, the foreman of the defendant (who was a stevedore employed with a gang of men to put certain iron rails on board a ship in the dock), threw an iron rail off the cart without giving any warning, and struck and injured the plaintiff.

Felix Brocksop, who described himself as outside warehouseman to Davis & Co., said that he saw Malone unloading the cart, turning off the iron; that Malone gave no warning; that the iron was thrown over the wheel, as was usually done; that the iron was placed on trucks for the purpose of being conveyed alongside the ship; and that there was sufficient room (about 8 feet) to pass between some bacon which was lying there and the cart. On cross-examination, this witness said,—“Poulsom is a stevedore. He receives the iron rails after they are thrown out of the cart on to the ground, and takes them to the ship. It was a cart of a carrier named Wood. There is a passage outside the shed.” On re-examination he said that, as a practice, people did not go outside the shed.

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James Gradle, a carter, said: "I saw Wood's carter unloading iron. Malone threw the iron out of the waggon. No warning was given." On cross-examination, he said: "It takes two or three men to shove the iron off. Many people are lamed in unloading iron. Edward Strongfellow was the carter."

Edward Strongfellow said: "I was the carter. I was carrying the iron. Poulson was stevedore. There was a man to count the rails. I was putting them down on the off side near the vessel, when Malone told me to put them on the other side; and, when I would not do so, he got into the cart and threw the iron out which did the injury. Malone is Poulson's servant. He got into the cart, and threw the iron out himself." On cross-examination, Strongfellow said: "It is our duty to put the rails down out of the cart on the ground, and then the stevedore takes them to the ship."

A surgeon described the injury which the plaintiff had sustained.

It was objected on the part of the defendant that he was not under the circumstances liable for the misconduct of his servant, Malone. The learned judge thereupon nonsuited the plaintiff, giving him leave to move this Court to enter a verdict (by consent) for 30*l.*, if the Court should think fit.

A rule nisi having been obtained,

May 3. *Gully* shewed cause. Malone, in throwing the iron out of the cart, was not acting within the scope of his employment. His duty commenced only when the iron rails had been placed on the ground; and, in anything done by him beyond taking them from the ground to the ship, and there stowing them, he was a mere volunteer. A master is not responsible for acts done by his servant which do not fall within the ordinary scope of his authority. It is only for the negligent exercise by the servant of his duty to his master that the latter is liable.

[GROVE, J. Where the act is closely connected with the employment, must it not be a question for the jury? Can we say that this act of Malone was so wholly unconnected with the scope of his employment that it could not have been his duty to help the carter to unload the iron?]

The only question of fact for the jury was whether or not Malone had been guilty of culpable negligence.

[DENMAN, J., referred to *Whatman v. Pearson* (1) and *Storey v. Ashton*. (2)]

[The following cases were cited,—*Limpus v. London General Omnibus Co.* (3), *Seymour v. Greenwood* (4), and *Page v. Defries*. (5)]

Crompton, in support of the rule. The plaintiff is entitled to a verdict, if there was any evidence which could properly have been submitted to the jury that Malone was acting within the scope of his employment; and that question ought to have been left to them. [The following cases were cited,—*Poulton v. London and South Western Railway Co.* (6), *Barwick v. English Joint Stock Bank* (7), *The Thetis* (8), *Bayley v. Manchester, Sheffield, and Lincolnshire Railway Co.* (9)]

[DENMAN, J. Is it not a question of fact whether this was anything more than a slight deviation from the strict line of Malone's duty? I think it was held by the Court of Queen's Bench in a recent case of *Woolley v. Curling* (10) that the question whether or not an act was within the scope of the servant's authority ought to be submitted to the jury.]

Cur. adv. vult.

The judges differing in opinion, the following judgments were delivered:

DENMAN, J. In this case, which was tried before the judge of the Passage Court at Liverpool, who nonsuited the plaintiff, a rule was obtained to set aside that nonsuit, and to enter a verdict for the plaintiff for 30*l.* damages, if this Court should think fit.

It was assumed, upon the argument of the rule, by the counsel on both sides, and I think we are also bound to assume, that this reservation means that the plaintiff is to be entitled to the verdict for 30*l.* if this Court should be of opinion that there was evidence

(1) Law Rep. 3 C. P. 422.

(2) Law Rep. 4 Q. B. 476.

(3) 1 H. & C. 526; 32 L. J. (Ex.) 34.

(4) 7 H. & N. 355; 30 L. J. (Ex.) 189.

(5) 7 B. & S. 137.

(6) Law Rep. 2 Q. B. 534.

(7) Law Rep. 2 Ex. 259.

(8) Law Rep. 2 A. & E. 365.

(9) Law Rep. 7 C. P. 415; in error, Law Rep. 8 C. P. 148.

(10) Not reported.

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upon which the jury might not unreasonably have found for the plaintiff. I am of opinion that there was such evidence.

The material facts proved at the trial were as follows:—The defendant was a stevedore who was employed to ship some iron rails which were to go by a ship lying in the Huskisson Dock at Liverpool. He had a foreman named Malone, who on the day in question was acting for him at the dock. The iron rails were being unloaded from a cart which belonged to one Wood, and was standing at a small distance from the ship on board of which the rails were in course of being loaded. The carter, in unloading the rails, was putting them down on one side of the cart, when Malone,—for what purpose is not stated, but, I think it may be inferred, in order to assist his own operations in some way,—told him to put them on the other side, and, upon his refusal, got into the cart and threw out some rails, one of which injured the plaintiff, a passer by.

The only evidence in relation to Poulson's or Malone's duty in respect of the iron rails in question was as follows:—The second witness, a warehouseman in the service of the plaintiff's employers, on his cross-examination, said: "Poulson is a stevedore. He receives the iron rails after they are thrown out of the cart on to the ground, and takes them to the ship." The carter on his cross-examination said:—"It is our duty to put the rails down out of the cart on the ground; and then the stevedore takes them to the ship."

It was contended for the defendant that, upon these facts, there was no evidence upon which a jury could have found a verdict for the plaintiff: and upon this ground the learned judge nonsuited the plaintiff.

The contention before us on the part of the defendant was, that, inasmuch as the duty of the stevedore did not commence, in relation to any particular portion of the rails in question, until they were on the ground, it was impossible to hold the defendant liable for the act of Malone in throwing the rail in question from the cart; that that act could not be within the scope of his employment or duty, being an act done at a period antecedent to that at which his duty in relation to the iron commenced, and at a place where he had no business to be meddling with it at all.

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In my opinion, this contention of the defendant proceeds upon too narrow a view of the duty or employment of Malone; and I think that the cases applicable to the subject establish that, even though in the *ordinary* course of his employment, it would not be a part of Malone's duty to assist in moving the rails from the cart, it was still a question for the jury, and not for the judge, whether in this particular case he was acting within the scope of his employment

It cannot, I think, be contended in this case that the judge or jury were bound to hold that Malone was acting for any purpose of his *own*, as distinguished from his master's service, as was the case in *Storey v. Ashton* (1), where the carman through whose negligence the plaintiff was injured had been induced by a clerk of the defendants to drive him in a wrong direction, after business hours, on business of the clerk's; nor, as it appears to me, if it *was* a question for the jury, would it be unreasonable for them to have found that he was acting within the scope of his employment, inasmuch as they might not unreasonably have thought that the act was one done for his master's benefit, and with a zealous desire to expedite the work, and, for aught I know, in a manner proper and even usual under the circumstances for a person employed as Malone was at the time.

In *Joel v. Morison* (2),—which, though a *nisi prius* case, is cited with approval in many other cases decided by the Courts,—Parke, B., says: "The master is only liable where the servant is acting in the course of his employment:" but he immediately adds: "If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable." And earlier in the same summing-up the learned Baron says: "If the servant, being on his master's business, took a detour to call upon a friend, the master will be responsible." And this view of the law is entirely in accordance with the judgments in *Whatman v. Pearson* (3), cited for the plaintiff, which indeed is a stronger case, inasmuch as there the servant acted in violation of his instructions.

No doubt, cases may be put in which a servant may so conduct

(1) Law Rep. 4 Q. B. 476.

(2) 6 C. & P. 501.

(3) Law Rep. 3 C. P. 422.

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himself, about goods of his master with which he is dealing as servant, as to make it clear that the master is not responsible for his negligence in the course of such conduct. *Storey v. Ashton* (1), mentioned above, and *Mitchell v. Crassweller* (2), were such cases. But, can it be said that, in the present case, it would have been unreasonable for a jury to find that the act of the foreman in getting into the cart and throwing the iron down was an act *bonâ fide* and not unreasonably done in the zealous discharge of his duty to his master, in the course of the business he was employed upon? And, if they were of that opinion, might they not also properly find that he was acting within the scope of his employment? I think they might, and therefore that this nonsuit was wrong, and that, by virtue of the understanding at the trial, the rule should be made absolute to enter the verdict for 30*l*.

My Brother Grove agrees with me that in this case there was evidence for the jury, and that the nonsuit was therefore wrong.

BRETT, J. In this case the plaintiff sued the defendant for injuries alleged to have been caused by the defendant's servant. The cause was tried before the judge of the Passage Court at Liverpool and a jury. The plaintiff in his evidence stated that he was in the employ of Messrs. Davis & Co.; that he was at work for them at the Huskisson Dock; that one Malone, the defendant's foreman, threw an iron rail off a cart, which struck and crushed him, the plaintiff. Malone, he said, was ordering the truck men to take the iron from the cart to the ship. Felix Brocksop, being examined, said that he was outside warehouseman to Davis & Co.; that he saw Malone unloading the cart, and saw him throw the iron off the cart. Being cross-examined, he said that the defendant is a stevedore; that he, as such, receives the iron rails after they are thrown out of the cart on to the ground, and takes them to the ship. The cart was the cart of one Wood, a carrier. James Gradle stated that he saw Wood's carter unloading iron, and saw Malone throw the iron out of the cart. Edward Strongfellow said that he was Wood's carter; that he was carrying the iron rails; that he was putting them down on the off side of the cart, when

(1) Law Rep. 4 Q. B. 476.

(2) 13 C. B. 237; 22 L. J. (C.P.) 100.

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Malone told him to put them on the other side; and that, when he would not do so, *Malone got into the cart and threw the iron out.* Being cross-examined, he said: "*It is our duty to put the rails down out of the cart on the ground, and then the stevedore takes them to the ship.*"

Upon this evidence, the learned judge nonsuited the plaintiff, giving him leave to move this Court to enter a verdict for the plaintiff, by consent, for 30*l.*, if the Court should think fit. A rule having been obtained according to the leave reserved, the case was argued before my Brothers Grove and Denman and myself.

The question was stated in argument on both sides to be, whether there was evidence that Malone was acting within the scope of his authority. If there was, it was admitted by the defendant's counsel that the judgment should be for the plaintiff. If there was not, it was admitted by the plaintiff's counsel that the judgment should be for the defendant.

The arguments raise the question, what is the proper application in point of law in this case of the phrase or doctrine "that the servant must be acting within the scope of his authority." Some cases have raised the question whether the servant in what he did was intending to act for his master or for purposes of his own. That does not seem to me to be the point in this case. Malone may be considered to have been intending to act in performance of the duty delegated to him. In this case the question is whether the time had arrived or the circumstances had arisen for doing anything which the servant was employed to do. Had his employment commenced? "The question," says Lush, J., in *Storey v. Ashton* (1), "in all such cases is, whether the servant was doing that which the master employed him to do." "Where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant:" per Maule, J., in *Mitchell v. Crassweller*. (2) "It is not sufficient that the act should be done with intent to benefit or intent to serve the master. It must be some-

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(1) Law Rep. 4 Q. B. at p. 480.

(2) 13 C. B. 237, 247; 22 L. J. (C.P.) 160.

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thing done in doing what the master has employed the servant to do:" per Blackburn, J., in *Limpus v. London General Omnibus Co.* (1) In *Whatman v. Pearson* (2), the servant was held to be acting in the course of his employment, because he was employed to manage the horse and cart *during the day*: per Byles, J. (3)

Now, in the present case, Brocksop, who was the warehouseman of Davis & Co., the shippers of the iron rails, stated that the defendant's employment was to receive the rails *after* they were thrown out of the cart *on to the ground*, and take them to the ship. It was, therefore, obviously the business of Davis & Co., by their own servants or some other agent of theirs, to carry the rails to the quay and place them on it, i.e. on to the ground there, for the defendant to carry them thence into the ship and there stow them. And it is obvious that Davis & Co. employed Wood, a master carter, to carry the rails to the quay and deliver them there. Strongfellow, who was Wood's carter, stated, "It is our duty to put the rails down out of the cart *on the ground*, and *then the stevedore takes them to the ship*." The joint employers of Wood and the defendant, therefore, limit the commencement of the defendant's employment to a time after the rails were on the ground. And the person employed on the previous and antecedent operation, viz. that of carrying the rails from the warehouse and delivering them out of the cart on to the quay, equally limits the commencement of the defendant's employment to the time after the rails are on the ground.

Now, what the defendant was employed to do, what he might according to that employment have done himself, he employed Malone to do. He employed Malone to carry the iron rails, *after they were on the ground at the quay*, thence into the ship, and there stow them. For anything done by Malone in carrying or stowing the rails, or anything done by Malone with the rails after they were on the ground, with intent to carry out his orders to take them into the ship and stow them there, the defendant would have been liable. But it seems to me that the defendant had not employed Malone to do anything with regard to the rails before they

(1) 1 H. & C. 526; 32 L. J. (Ex.)
34,

(2) Law Rep. 3 C. P. 422.

(3) Law Rep. 3 C. P. at p. 425.

were on the ground. The defendant himself was not employed to do anything with the rails before they were on the ground. Anything voluntarily done by Malone, therefore, before the rails were on the ground, though done with intent to serve the defendant, was not a thing done which the defendant had employed Malone to do. The evidence which described and limited the employment of the defendant and of Malone was given on behalf of the plaintiff, and there was no evidence to vary or render doubtful the limitation of the commencement of that employment. There was no question which the jury would have been entitled to entertain about it. The judge was, in my opinion, bound to say that what was done by Malone was done before his employment by the defendant was called into play, that is to say, it was a thing which the defendant had not employed Malone to do.

I am of opinion, therefore, that the learned judge was right in nonsuiting the plaintiff, and that this rule ought to be discharged.

The majority of the Court, however, being of a different opinion, the rule will be made absolute to set aside the nonsuit and enter a verdict for the plaintiff for 30*l.*, the damages agreed upon at the trial.

Rule absolute.

Attorneys for plaintiff: *Torr, Janeway, & Co., for Edwin Hughes, Liverpool.*

Attorney for defendant: *S. C. H. Sadler, for T. T. Bellringer, Liverpool.*

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Marine Insurance—Loss of Freight—Right of Charterer to throw up Charterparty where Vessel disabled.

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The plaintiff, on the 9th of November, 1871, effected an insurance "on chartered freight valued at 2900*l.* at and from Liverpool to Newport in tow, whilst there, and thence to San Francisco," &c. The ship left Liverpool on the 2nd of January, 1872, and on the 4th, before arriving at Newport, took the rocks in Carnarvon Bay. She was got off much damaged, and returned to Liverpool on the 12th of April, where she was sold under circumstances which the Court held not to be justifiable; there being no satisfactory evidence of a constructive total loss. She was repaired by the purchaser, and was still under repair at the time of the trial, the 16th of April, 1872.

By the charterparty the vessel was to proceed with all convenient speed (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. After the vessel took the rocks, and before she was got off, viz. on the 15th of February, the charterers threw up the charter, and on the following day they hired another ship to carry the rails (which were wanted for the construction of a railway) to San Francisco. The plaintiffs sued the underwriters for a loss of the chartered freight. The jury found that the time necessary for getting the ship off and repairing her was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time, and so long as to put an end in a commercial sense to the commercial speculation entered upon by the ship-owner and the charterers:—

Held, by Keating and Brett, JJ., that the charterers were absolved from loading the vessel, and that the ship-owner therefore might recover for the loss of freight.

Held, contra, per Bovill, C.J., that the charterers were not entitled to throw up the charter, and that consequently the plaintiff could not recover against the underwriters, and that the findings of the jury were immaterial.

Approved in Ex Ch R 1010 R 25

THESE were actions upon two policies of insurance, the one on thirty-four sixty-fourths of the ship *Spirit of the Dawn*, valued at 8000*l.*, the other on chartered freight, valued at 2900*l.*, to be earned by that vessel on a voyage from Newport to San Francisco. In the action upon the policy on ship, the defendants paid 1200*l.* into Court; in the action upon the policy on freight, they denied that there was any loss by a peril insured against.

Both causes were tried together before Brett, J., at the Liverpool Summer Assizes, 1872. Evidence was given that the ship before reaching Newport got upon the rocks in Carnarvon Bay and was after considerable delay got off much damaged. Evi-

dence was also given as to the amount of repair which would be required to make the ship seaworthy, and of her value when repaired, and also of the probable time which would be consumed in repairing her. It was further proved that the vessel had been chartered by Messrs. Rathbone & Co. to carry rails which were wanted for the construction of a railway at San Francisco; and that, time being of importance to the charterers, they immediately on being made aware of the disaster to the ship hired another to take out the rails.

The learned judge left it to the jury to say,—first, whether there was a constructive total loss of the ship,—secondly, whether the time necessary for getting the ship off the rocks and repairing her so as to be a cargo-carrying ship was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time,—thirdly, whether such time was so long as to put an end in a commercial sense to the commercial speculation entered upon by the ship-owner and the charterers. The jury answered all these questions in the affirmative.

The learned judge, being of opinion that there was no evidence of a constructive total loss of the ship, and no evidence of a loss of freight by the perils insured against, directed a verdict to be entered for the defendants, subject to leave reserved to the plaintiff to move to enter a verdict for him on both or either of the policies.

A rule nisi was accordingly obtained in the following Michaelmas Term to enter a verdict for the plaintiff, on the grounds that the learned judge was wrong in holding that there was no evidence of a total loss of freight, that the plaintiff was under the circumstances entitled to insist upon the fulfilment of the charter-party, that the reasonableness of the delay was not a question for the jury, and that the reasonable time allowed to the ship-owner was the time required for getting the vessel off the rocks and repairing her; or for a new trial on the ground of misdirection in those respects,—the defendants to be at liberty, in shewing cause against the rule, to argue that the findings of the jury upon the questions submitted to them were against the weight of evidence; and the Court to have power to refer any question to an averager-stater, and to enter the verdict in accordance with his adjustment.

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Cause was shewn against this rule in Hilary Term, 1873, by *C. Russell, Q.C.*, and *Benjamin, Q.C.*, for the defendants; and *Butt, Q.C.*, and *Gully*, for the plaintiff, were heard in support of the rule. The Court took time to consider.

The facts which were proved at the trial, and the arguments which were urged and the authorities cited upon the hearing are fully set out in the respective judgments.

Cur. adv. vult.

July 15. There being a difference of opinion, the judgments of the Court (Bovill, C.J., and Keating and Brett, JJ.) were delivered by

BOVILL, C.J. The Court not being unanimous, I have to deliver the judgment of my Brother Brett, whose absence on Circuit has prevented his attendance here to-day, and to state that my Brother Keating, who is also on Circuit, concurs in that judgment.

BRETT, J. Two actions were brought on two policies of insurance effected by the plaintiff with the defendants, the first being on the ship *Spirit of the Dawn*, of which the plaintiff was owner, and the second on chartered freight to be earned by the same ship.

At the trial before me at the Summer Assizes held at Liverpool in 1872, on which occasion both actions were tried together, it was proved that the plaintiff, on the 22nd of November, 1871, entered into a charterparty with Messrs. Rathbone & Co., by which the ship *Spirit of the Dawn* was to proceed with all convenient speed from Liverpool to Newport, and there ship a cargo of iron rails (railway iron) for San Francisco, ordinary perils excepted, and the freight payable on right delivery of the cargo, &c.

On the 9th of December, 1871, the plaintiff, through his agents, effected with the defendants the freight policy sued on, being "on chartered freight valued at 2900*l.*, at and from Liverpool to Newport in tow, while there, and thence to San Francisco, &c." On the 12th of December, 1871, the policy on ship was effected for the same voyage on thirty-four 64ths of ship, valued at 8000*l.*

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After some complaints from the charterers as to delay, the ship sailed in tow from Liverpool on the 2nd of January, 1872. On the 4th of January, 1872, the ship, which was an iron ship, before arriving at Newport, took the rocks in Carnarvon Bay. By authority of the plaintiff and the defendants, Captain Chisholm, of the Salvage Association, proceeded to endeavour to extricate and save the ship. She was got into a place of comparative safety on the rocks on the 18th of February, 1872, and was got off the rocks and into Holyhead between the 21st and 24th of March, and was by consent of the plaintiff and the defendants taken back to Liverpool, still in charge of the Salvage Association, on the 12th of April, 1872. The salvage charges for rescuing the ship and bringing her to Liverpool were 4208*l*. Upon survey, the estimated cost of repairs was 3650*l*. Due notice of abandonment was given on both policies, but not accepted. The ship was thereupon sold to a Mr. Wilson, who proceeded to repair her. The ship was still under repair at the time of the trial, which was the 16th of August, 1872.

On the 16th of February, 1872, Messrs. Rathbone & Co. chartered, without the consent of the plaintiff, another ship, by which they forwarded the rails to San Francisco. The rails were wanted there for the construction of a railway.

Upon this evidence, and some other as to the value of the ship when repaired, I left it to the jury to say,—first, whether there was a constructive total loss of the ship,—secondly, whether the time necessary for getting the ship off and repairing her so as to be a cargo-carrying ship was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time,—thirdly, whether such time was so long as to put an end in a commercial sense to the commercial speculation entered upon by the ship-owner and the charterers. The jury answered all these questions in the affirmative. I, upon the view that there was no evidence, according to the figures, of a constructive total loss of the ship, and no evidence of a loss of freight by the perils insured against, because the ship-owner had a right to repair his ship, however long it might take, and insist after its repair on the delivery of the agreed imperishable cargo so as to enable him to earn the chartered freight, directed the verdict to be entered for

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the defendants, reserving leave to the plaintiff to move to enter a verdict on either or both of the policies.

Mr. Butt moved accordingly and obtained a rule nisi in Michaelmas Term, 1872; it being agreed that, upon shewing cause against such rule, the defendants should be at liberty to argue, as against the application to enter the verdict for the plaintiff, that the findings of the jury on all or any of the questions left to them were against the weight of evidence. This rule was argued before us in Hilary Term of the present year.

It was determined in the course of the argument that the verdict as to the total loss of the ship was unsatisfactory; and by the agreement of the counsel that part of the case is to be referred as an average loss.

In the action on the policy on freight, it was argued for the defendants that, unless there was a total loss of ship, either actual or constructive, there could be no loss of freight by perils of the sea; that the plaintiff, the ship-owner, in the case of damage to the ship, however great, where such damage was not caused by any default of his own, had a legal right under such a charterparty as the present to repair his ship with reasonable diligence, and to tender her when repaired, however long a period of time such repairs might take, to the charterer, and to insist on the loading of the agreed cargo, if the cargo was of such a nature as to be able to be carried at the end of such period on the agreed voyage so as to earn freight. If the ship-owner, it was argued, is in such circumstances prevented from earning freight by the refusal of the charterer to supply cargo, his loss must be recovered by action against the charterer; it is a loss caused by the illegal refusal of the charterer to supply cargo, and not by the perils insured against. It was further argued that none of the findings of the jury displaced this position, and that the findings of the jury were against the weight of the evidence.

For the plaintiff it was urged, that the findings of the jury were justifiable, and that on either or both of them the ship-owner ceased to have the power to enforce his rights under the charterparty to earn freight; that, assuming either or both of the findings to be true, although the ship was not a total loss, the charterer, who had not as yet received any benefit from the charterparty,

could not be obliged to supply any cargo; that the power of earning the chartered freight, which was the freight insured, was consequently lost to the plaintiff immediately on the happening of the damage to the ship, such damage being to the extent found by the jury; that such damage was caused by, and therefore the loss was the immediate result of, a peril insured against.

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The first point raised by these arguments is, whether the findings are so far against the weight of the evidence as to call upon the Court to set them aside. If it had been within my province, I would at the trial have given answers to both questions different from the answers returned by the jury. But the amount of freight on which ship-owners will undertake charters depends very much upon the time at which such charters are negotiated and the time then calculated for their fulfilment. Freight rises and falls according to the variations of the freight market; and so, on the other hand, the expediency or otherwise of the export of iron or iron rails depends upon the iron market and its fluctuations at different times. Taking these views into consideration, and paying considerable deference to the finding of a mercantile special jury with regard to them, I am not prepared to say that the findings are wrong. They must, therefore, be treated as correct and binding.

The question, then, is, whether, assuming the findings to be correct, there was a loss of freight by perils of the sea. That question divides itself into two,—first, did the injury to the ship, caused as it undoubtedly was by sea peril, make it impossible for the ship-owner to earn the chartered freight?—secondly, if it did, does such impossibility so caused amount to a loss by perils of the sea within the meaning of a freight policy on chartered freight? The first question depends upon what were the rights under the circumstances of the plaintiff and the charterers under the charterparty; the second upon the rights of the plaintiff and the defendants under the policy.

As to the first, the question is whether, upon an injury happening to a chartered ship in the voyage preliminary to that on which the chartered freight is to be earned, happening before the charterer has received any advantage from the contract, where the injury is caused by a peril excepted in the charterparty, where

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it is caused without default of the ship-owner, where he has not been wanting in due diligence to arrive at the appointed place of loading, but where the injury is so great as to prevent the arrival of the ship or of her presentment to the charterer in a state fit to carry cargo within a reasonable time having regard to the business of the charterer, or within any time which could have been at the time of making the contract in the contemplation of either the charterer or ship-owner as a time in any way applicable to the commercial speculation of either of them,—the question is, whether the contract is not at an end, in the sense that neither party to it can enforce any obligation under it against the other. In other terms, the question may be stated to be, whether in such a contract there is not an implied stipulation that the ship-owner cannot, upon the happening of such extensive injury to the ship, though without default of his, compel the charterer to supply at so remote a date a cargo, and that the charterer, conversely, cannot compel the ship-owner at so remote a date to tender his ship,—the reason being that the contract is not applicable, and could not in the mind of either party have been considered as applicable, at the time of making it, to the earning of profit either by the ship-owner or the charterer by reason of the transport of goods at so remote a period under mercantile contingencies and on mercantile considerations which must be absolutely different from and unconnected with any consideration then before them. There being no stipulation that the ship should be at Newport at any fixed date, the stipulation being only that she should proceed there with all convenient speed, there is no condition precedent that she should be there at any given time: *Hadley v. Clarke*. (1) The cases of *Clipsham v. Vertue* (2), *Hurst v. Usborne* (3), and *Jones v. Holm* (4), seem to me authorities for saying that there is no condition precedent, though there is a contract that the ship shall arrive or be fit to be tendered within a reasonable time in regard to the charterer's business. If the finding of the jury, therefore, on the second question proposed to them is immaterial, the question itself was immaterial. Even a delay caused by the default of the ship-owner will not of itself release the charterer from his obligation to

(1) 18 T. R. 259.

(3) 18 C. B. 144; 25 L. J. (C.P.) 209.

(2) 5 Q. B. 265.

(4) Law Rep. 2 Ex. 335.

provide a cargo: *Havelock v. Geddes* (1); *Clipsham v. Vertue*. (2) But, in *Havelock v. Geddes*, Lord Ellenborough deals with the rights of the parties where the ship is so unfit as to take from the charterer all the advantage he can be supposed to have originally contemplated from the contract, and where he has in fact had no advantage whatever from it. "Had the plaintiff's neglect," he says (3), "here precluded the defendants from making *any* use of the vessel, it would have gone to the whole consideration, and might have been insisted upon as an entire bar." In *Freeman v. Taylor* (4), Tindal, C.J., directed the jury, in an action for not loading, "that the freighter could not for an ordinary deviation put an end to the contract; but, if the deviation was so long and unreasonable that in the ordinary course of mercantile concerns it might be said to have put an end to the whole object the freighter had in view in chartering the ship, in that case the contract might be considered at an end." He left it to the jury to decide. The jury found for the defendant, the freighter; and the Court held that there was no misdirection. In *Tarrabochia v. Hickie* (5), Cresswell, J., in an action against the freighter for not loading, asked the jury whether the vessel sailed and proceeded to Cardiff with convenient speed, or in a reasonable time; and, if not, whether the object of the voyage was thereby frustrated. The jury found that the vessel did not with all convenient speed, or in a reasonable time, sail and proceed to Cardiff, but that the object of the voyage was not thereby frustrated. A verdict was entered for the defendant; leave being reserved to the plaintiff to move to enter a verdict for him. The rule was refused. That case is a direct authority against the second question and answer in this case: but it seems to assume the propriety and materiality of the third question and answer.

In *Blasco v. Fletcher* (6), it was elaborately argued that the ship-owner, in case of damage to the ship by an excepted peril in the charterparty, is entitled to any period of time, however long, to repair his ship, and is entitled to insist on carrying the agreed

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(1) 10 East, 555.

(2) 5 Q. B. 265.

(3) 10 East, at p. 564.

(4) 8 Bing. 124.

(5) 1 H. & N. 183; 26 L. J. (Ex.) 26.

(6) 14 C. B. (N.S.) 147; 32 L. J. (C.P.) 284. *99 L. R. 1105.*

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cargo and on earning freight at the end of such time. The decision is put on other grounds: but it is evident that the Court did not accept the validity of the argument urged on behalf of the ship-owner. In *MacAndrew v. Chapple* (1), Willes, J., states the present position of decision to be thus: "It seems to be now settled that delay by deviation is the same as a delay in starting; and it is also settled, at any rate in this Court, that a delay or deviation which, as has been said, goes to the whole root of the matter, deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship, is an answer to an action for not loading a cargo; but that loss, delay, or deviation short of that gives an action for damages, but does not defeat the charter." In *Geipel v. Smith* (2), Blackburn, J., speaking of the contract of charterparty, and of the parties to it, says (3): "The object of each of them was the carrying out of a commercial speculation within a reasonable time; and, if restraint of princes intervened and lasted so long as to make this impossible, each had a right to say 'our contract cannot be carried out,' and therefore the ship-owner had a right to sail away, and the charterer to sell his cargo or refrain from procuring one, and treat the contract as at an end."

In the opinions given by the judges in the House of Lords in *Rankin v. Potter* (4), Blackburn, J., says (5): "I should have added a further term, that the repairs could be done so promptly that she might arrive at Calcutta within a reasonable time as between the ship-owner and De Mattos, were it not for the case of *Hurst v. Osborne* (6), which seems to me an authority against this position. And, though I should not hesitate to advise your Lordships to re-consider that case, if necessary, I think it is not necessary to do so in the present case." And Bramwell, B., says (7): "I may observe in passing that I could not, acting as a jurymen, find as a fact that they could have repaired the ship in time for it to be ready for the adventure for which De Mattos agreed to find the cargo; and indeed, as the case stands, I should

(1) Law Rep. 1 C. P. 643, 648.

(2) Law Rep. 7 Q. B. 404.

(3) Law Rep. 7 Q. B. at p. 413.

(4) Law Rep. 6 H. L. 83.

(5) Law Rep. 6 H. L. at p. 117.

(6) 18 C. B. 144; 25 L. J. (C.P.) 209.

(7) Law Rep. 6 H. L. at p. 136.

think he might have refused, on the ground that the ship was a year overdue." And, again (1): "No doubt, had the owner repaired the ship, the loss of freight would not have been total, supposing the repairs in time for the voyage for which De Mattos undertook to find a cargo, which, if it were in controversy, I could not find in the plaintiff's favour." And Brett, J., said (2): "Without, therefore, relying upon the other impediment and prevention obviously in the way of the plaintiff's earning the charterparty freight, viz. the certainty from the extent of damage that the ship could not be repaired so as to be seaworthy within any time during which the charterer would be bound to wait, it seems to me that the other facts which I have mentioned shew conclusively that there was a loss of freight by reason of damage to the ship caused by sea peril, happening during the voyage insured."

These authorities seem to support the proposition, which appears on principle to be very reasonable, that, where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have *any* application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made. Such a state of things arises where the third question left to the jury in this case can be properly answered as the jury have answered it in this case.

In such a state of things arising under a charterparty such as the charterparty under discussion, where no benefit of any kind has accrued to the charterer, the ship-owner has lost his power of earning any part of the chartered freight. The immediate cause of such a loss is, the extent of injury caused to the ship by a peril insured against under the policy during the voyage thereby insured. Such a loss is therefore a loss caused by a peril insured against, within the policy on freight.

For these reasons, I think that, in the action on the policy on freight, the rule must be made absolute to enter the verdict for the plaintiff for a total loss.

BOVILL, C.J. The first question in these cases was, whether

(1) Law Rep. 6 H. L. at p. 137.

(2) Law Rep. 6 H. L. at p. 104.

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there was a total loss of the ship within the meaning of the policy. The jury found that there was such a constructive total loss; but my Brother Brett was dissatisfied with the verdict upon that point, and during the argument it was agreed that the Court should dispose of it, and that, if in our opinion the total loss could not be maintained, the amount of the average loss upon the ship should be referred to an average-stater.

The evidence upon this point was no doubt contradictory; but it strongly preponderated in favour of the defendants (quite independently of any liability of the freight to contribute to the expenses of salvage); and, although the ship was upon the rocks, yet, from her position there, and the probability of her being got off, and looking to the evidence of the damage which she had sustained and of the probable expense of repairing her, I am of opinion that the circumstances were not sufficient to establish a total loss of the ship, or to justify her abandonment. An intimation to this effect was given by the Court in the course of the argument; and I concur with my learned Brothers in their judgment that the plaintiff cannot maintain his claim for a total loss of the ship. The amount of the partial loss will be ascertained by an average-stater, as arranged.

With respect to the insurance on the freight, I have the misfortune to differ from my learned Brothers, and think that the plaintiff is not entitled to recover. As there was no total loss, either actual or constructive, of the ship, the only loss of freight was that which arose from the refusal of the charterers to load the vessel, and from the plaintiff's not having insisted upon their performance of the contract. The plaintiff contends that, under the circumstances, and by reason of the perils insured against, the charterers were absolved from their engagement to load the vessel, and that he was therefore justified in adopting the charterers' refusal to load, and may maintain this action for a loss of the freight against the underwriters on freight.

The question then is, whether the charterers were justified in throwing up the charter. By the charterparty the vessel was to proceed with all convenient speed (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. On the 2nd of January, 1872, the vessel, having been properly equipped, proceeded on her voyage

from Liverpool to Newport, and on the following day took the rocks in Carnarvon Bay. Whilst she remained there, viz. on the 15th of February, the charterers threw up the charter, and the next day hired another ship by which they forwarded the iron rails to San Francisco. The plaintiff on the same 15th of February, gave notice of abandonment of ship and freight to the underwriters, but which was not accepted. If there had been a total loss of the ship, both the charterers and the plaintiff would have been justified in the course which they took, and the underwriters would have been responsible for the loss of the freight; but, upon the facts as they appeared at the trial, we have already decided that there was no such total loss of the ship.

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It was probably a very convenient course as well for the charterers as for the ship-owner, in the then position of the vessel, and looking to the delay which would necessarily be occasioned by repairing her, to abandon the charter; and the plaintiff may have been more willing to acquiesce in its abandonment, from the hope of being able to claim the freight from the underwriters; but, if the charterers were not entitled to abandon their contract, the plaintiff clearly cannot recover for a loss of freight against the underwriters.

In considering whether the charterers were absolved from their contract, the position of the ship-owner must also be borne in mind. When the accident occurred, we must assume that in the ordinary course of business the ship-owner would have incurred expense in equipping his vessel and providing her with some portion at least of her stores and supplies, and had made engagements with the crew and for having the vessel towed to Newport, as well as other arrangements for the voyage: he would also in the ordinary course have probably insured her; and the voyage had actually been commenced. A ship-owner also constantly makes engagements for the further employment of his vessel, dependent upon the completion of a previous voyage: it is important to all parties to know what their rights and obligations are with reference to the prosecution of the voyage on the one hand, and the loading of the vessel on the other; and it would, as it seems to me, lead to the greatest inconvenience to ship-owners with reference to the engagements connected with their vessels if under such circumstances, after they

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had incurred expense and partially performed their part of the contract, and made no default, a charterer was at liberty to throw up the contract.

The vessel having met with misfortune in the course of navigation, and being upon the rocks, it was the duty of the plaintiff, both as regards the charterer and the underwriters, to use all reasonable and practicable means to get her off and repair her within a reasonable time, and then to prosecute the voyage and fulfil her engagements without any unreasonable delay. The reasonable time, however, would be that which was required for the purpose of putting the vessel in a fit state to continue her voyage; and, if the ship-owner had made default in that duty, his rights and liabilities might be very different from those which arise where there is no default on his part.

There was no engagement in this charterparty that the vessel should arrive at Newport by any particular day or within any specified time; and, if it was of importance to the charterers that the ship should be there to receive the rails by any particular time, they might have introduced a stipulation into the charter to that effect. As they did not do so, the risk and consequences of any justifiable delay must, I think, rest with and fall upon them. If a charterparty were altogether silent as to the time of proceeding to the port of loading, the law would imply that it was to be done within a reasonable time: but, in this case, as in most charterparties, the obligation of the ship-owner was not left to be implied, but was made the subject of express stipulation; and all that the ship-owner agreed to do was, to proceed to Newport with all convenient speed, with an express stipulation, in the usual form, whereby the dangers and accidents of the seas were excepted. This stipulation would, in my opinion, equally apply to any implied engagement to proceed within a reasonable time as to the express agreement to proceed with all convenient speed, and must govern the rights of both parties. Where such an exception is contained in a charterparty, it seems to me that, upon a misfortune occurring to a vessel, not amounting to an actual or constructive total loss, and for which neither party is responsible, it is not competent either for the charterer or the ship-owner, of his own will, and without the concurrence of the other party, to put an end to

the contract, and on this simple ground, that by the terms of the contract the parties have expressly agreed that such an occurrence shall not affect its continuance. If this were not so, whenever a vessel was stranded or got upon rocks, or even when she met with serious damage requiring heavy repairs and a long time to complete them, it would be in the power of a charterer who found the delay inconvenient or injurious, and likely to frustrate his object in making the charter, to abandon the charterparty; which would be contrary to every principle of law as applicable to contracts generally or to charterparties which contain the usual exceptions of the dangers and accidents of navigation.

In cases where the delay, inconvenience, or expense of repairing the vessel would materially affect and be injurious to both parties, they would generally agree to cancel the contract. But, where it is the interest of one party only to put an end to it, he must make out his right to do so before he can be justified in refusing to perform it. In order to excuse himself, he must bring his case within some exception in the contract, or there must be a breach by the other party of some condition or warranty, or of some stipulation in it which goes to defeat the whole consideration; otherwise, and however great the inconvenience may be to both or either of the parties from some unforeseen occurrence which is not provided for, the engagements of the contract must still be performed.

Upon a charterparty where the charterer does not stipulate for the arrival of the vessel by any particular date, the risk of her non-arrival, by reason of weather and the accidents of navigation, always rests with the charterer; and, where the stipulation is simply that the ship will proceed to the loading port with all convenient speed, the dangers of the sea excepted, the ship-owner performs his part of the contract, and there is no breach of it by him, if without his default the arrival of the vessel is delayed only by the accidents and dangers of the seas, even although that delay may prevent the loading of the vessel at the usual time, or so as to be profitable to the charterer.

The law has no power to make a contract different from that which a person has entered into; and, where a ship-owner does not agree that his vessel shall arrive at the loading port by any

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particular day, but only that she shall proceed there with all convenient speed, or, what the law would imply, that she shall proceed and arrive within a reasonable time, and expressly stipulates that this shall be subject to the dangers and accidents of the seas and navigation, I do not see how that exception is to be got rid of, or how a contract with such an exception can properly be construed as, or converted into, an absolute engagement on his part that his vessel shall proceed or arrive within a reasonable time, as if there were no such exception. If the contract could be so treated, it must be equally open to the ship-owner to put an end to it, and this in some cases might be productive of the greatest inconvenience to the charterer.

I quite admit the great inconvenience and possible loss to both ship-owner and charterer when any serious delay is caused by the necessity for heavy repairs arising from sea perils; but the answer to such an argument, as it seems to me, is, that, if either party desires to protect himself from such risk or inconvenience, he should introduce stipulations into the contract with that object; and if, instead of doing so, both parties agree that the vessel is to proceed and load subject to the accidents of navigation, which they expressly except, I think it is not competent for either of them afterwards to claim to be absolved from his contract by reason of an accident of navigation which he has expressly agreed shall be excepted.

If a man chooses to enter into a contract to do a particular act, he is bound to answer for it, although the performance of the act may be prevented by the occurrence of unforeseen circumstances which it was beyond his power to control, and which have arisen from no act or default of his own, because he might and ought to have provided for the contingency by his contract. (1) Where such a contingency is provided for, effect must be given to such provision as affecting the rights and obligations of both parties; and there is no principle of law that I am aware of which would excuse either party from performance of a contract, because such performance would be highly inconvenient or injurious to himself, or lead to extraordinary expense. Where a lessee had engaged to pay a proportion of the value of coal to be raised, unless pre-

(1) See *Paradine v. Jane*, Aleyn, 26.

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vented by unavoidable accident from working the pit, and the pit became flooded with water from an unavoidable accident, which prevented the coal being raised except at a cost exceeding its value when raised, it was held that, as all coal-pits are liable to such accidents, and inasmuch as the water might have been removed, though at a ruinous cost, and after some months' interruption of the working, the lessee was not excused from working the pit or paying the stipulated proportion of the coal which could have been so raised: *Morris v. Smith*. (1)

In all maritime contracts, the performance of them must necessarily be affected by the winds and waves, and also by the regulations of foreign ports, which may be wholly or partially inaccessible in consequence of sanitary or police regulations, or restrictions in time of war, and they must equally be dependent in some parts of the world upon frost and ice and all the accidents of the weather, as well as upon fire and all contingencies which are considered as the act of God; but, in the absence of express stipulation, the risks arising from such causes would not generally excuse the performance of the engagements of the contract on either side: see generally *Barker v. Hodgson* (2), *Kearon v. Pearson* (3), and *Jones v. Holm*. (4) It is on this account that, in charterparties, bills of lading, and other contracts of a similar description, the dangers of the seas and many other contingencies are usually provided against and excepted; and, in such cases, unless some precise time be stipulated for the arrival of a vessel, I apprehend there is no engagement by a ship-owner that the ship shall arrive within a reasonable time, but only that she shall arrive within a reasonable time unless prevented by the excepted perils. Where such matters have not been provided for by the contract, they have constantly led to the greatest possible inconvenience and serious loss to one or both of the parties, and the occurrence of them has practically frustrated the purposes and objects of one or other and sometimes of both the contracting parties; and yet it has, I believe, always been held that their occurrence, unless provided for, will not absolve either party; whilst, if they are provided for and excepted in the contract, the

(1) 3 Doug. 279.

(3) 7 H. & N. 386; 31 L. J. (Ex.) 1.

(2) 3 M. & S. 279.

(4) Law Rep. 2 Ex. 335.

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engagements of the parties must be construed accordingly, and the obligations of each party will be qualified by the exception.

In the case of *Hadley v. Clarke* (1), goods had been put on board the defendant's vessel under a contract to carry them for the plaintiff from Liverpool to Leghorn, the dangers of the seas only excepted. Leghorn was then in the possession of the French Republic; and, when the vessel reached Falmouth, an embargo was laid upon her under an order in council, and she remained there under the embargo for *more than two years*, viz. from July, 1796, until August, 1798. The question was, whether the defendants were bound to carry on the plaintiff's goods. It was contended amongst other things for the defendants, that it was sufficient if they had waited a reasonable time after the embargo was first laid, and that, there being no probability that it would be taken off within a reasonable time, and it in fact lasted for two years, that the contract was at an end. The Court, however, considered that the defendants were not absolved from the contract. Upon this point Lawrence, J., said (2): "The counsel for the defendants were driven to the necessity of introducing into this contract other terms than those which it contains. They contended that the defendants were only bound to fulfil their engagement within a reasonable time, and then argued that, as the embargo prevented the completion of the contract within a reasonable time, the defendants were absolved from the engagement altogether. But it was incumbent on the defendants when they entered into this contract to specify the terms and conditions on which they would engage to carry the plaintiff's goods to Leghorn. They accordingly did express the terms, and absolutely engaged to carry the goods, 'the dangers of the seas only excepted.' That, therefore, is the only excuse which they can make for not performing the contract. If they had intended that they should be excused for any other cause, they should have introduced such an exception into their contract. In *Aleyn*, p. 27, this distinction is taken,—'Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; but, when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, not-

(1) 8 T. R. 259.

(2) At p. 267.

withstanding any accident by inevitable necessity, because he might have provided against it by his contract.' So, in this case, there was one accident against which the defendants provided by their contract. They might also have provided against an embargo: but we cannot vary the terms of this contract, and the defendants must be bound by the terms of the contract that they have made."

In the case of *Touteng v. Hubbard* (1), a Swedish vessel belonging to the plaintiffs, and then in London, was chartered to proceed to St. Michael's and there load a cargo of fruit for London, restraints of princes and rulers excepted. The vessel proceeded on her voyage from London for St. Michael's, and put into Ramsgate Harbour, where she was detained under an embargo by the British government upon Swedish vessels *for six months*, viz. from the 15th of January until the 19th of June. She was then released; but the season for shipping fruit from St. Michael's was at that time over, and the charterer refused to load a cargo, on the ground that the season for shipping fruit had long since passed, and that the voyage would therefore be wholly useless and nugatory. The case was twice argued; and the ultimate decision proceeded upon the ground that the plaintiff, as a Swedish subject, could not recover from the defendant, a British subject, damages sustained in consequence of an embargo by the British government upon Swedish vessels. But, upon the general question, in the judgment of the Court delivered by Lord Alvanley, there are the following passages (2): "The only question, therefore, will be, whether the defendant was bound by the terms of the charterparty to furnish a cargo to the plaintiff, notwithstanding the intervention of the embargo. I will first consider for what purpose and for whose benefit the words 'restraint of princes and rulers during the said voyage always excepted' were inserted in the charterparty. It appears to me that they were introduced for the benefit of the master, not of the merchant, and that the true construction of the charterparty is this,—the captain engages to go to St. Michael's, restraint of princes excepted, and the merchant engages to employ him and furnish the ship with a cargo. Lord Kenyon, in the case of *Blight v. Page* (3), put this construction on an instrument

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(1) 3 B. & P. 291.

(2) 3 B. & P. at p. 298.

(3) 3 B. & P. 295, n.

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nearly similar with the present. If, then, this had not been the case of a Swedish ship hired by an English merchant, the merchant would have been under the necessity of furnishing the ship with a cargo if she had arrived at St. Michael's as soon as she conveniently might after the embargo was taken off, although, by arriving after the fruit season was over, the object of the voyage might be defeated: such is the doctrine in *Hadley v. Clarke* (1) and *Blight v. Page*. (2) I have no difficulty in subscribing to the doctrine laid down in *Hadley v. Clark* (1), that a common embargo does not put an end to any contract between the parties, but is to be considered as a temporary suspension of the contract only, and that the parties must submit to whatever inconvenience may arise therefrom, unless they have provided against it by the terms of their contract. The object of the voyage might equally have been defeated by the act of God as by the act of the state, as, if the ship had been weather-bound until the fruit season was over; and yet in that case the merchant would have been bound to fulfil his contract. The principle of *Hadley v. Clarke* (1) is, that an embargo is a circumstance against which it is equally competent to the parties to provide as against the dangers of the seas, and therefore, if they do not provide against it, they must abide by the consequences of their contract."

In *Hurst v. Osborne* (3), a vessel which was under charter by the defendants was delayed by perils of the seas one hundred and fifty-two *days* beyond the usual time of the voyage to the port of loading, and the defendants in consequence refused to load her, partly on the ground that she had arrived after the time when the export trade usually took place from the port of loading, viz. Limerick. All the judges were of opinion that the state of the trade at Limerick did not affect the question; and Willes, J., upon this point laid down the law as follows (4): "As to the other question, whether the construction of the charterparty can be affected by the fact that the particular description of cargo could only be supplied at a certain season of the year, the answer to that, I apprehend, is, that the charterparty was probably entered into in the hope that the vessel would arrive at Limerick at that time of the year. But the ques-

(1) 8 T. R. 259.

(3) 18 C. B. 144; 25 L. J. (C.P.) 209.

(2) 3 B. & P. 295, n.

(4) 18 C. B. at p. 155.

tion is, who takes the risk whether she will or not? Why, the person who is to ship the goods takes the risk, unless he stipulates that the other party shall take it. Here it is not stipulated that the vessel shall arrive at Limerick by any particular day, but only that she shall proceed there with all convenient speed. The owner has performed his contract to proceed to Limerick with all convenient speed, when he has done all he could, but has been prevented by dangers of the seas."

In the American case of *Allen v. Mercantile Marine Insurance Co.* (1), a vessel had been stranded and sprung a leak which took three weeks to repair, during which time she was frozen in by ice, and there was no possibility that the navigation would be free or the vessel be able to continue her voyage *for five months*. There was the usual exception in the bill of lading of dangers of navigation. The cargo had been delivered up to the shipper free of freight, and the action being brought against the underwriters for loss of freight, it was held that both the stranding and the closing of the navigation were dangers of the navigation within the exception of the bill of lading, and excused the delay which would necessarily ensue in making delivery of the cargo at the port of destination, and did not afford a sufficient excuse for the voluntary surrender of the cargo to the shipper free of freight, and that the underwriters on freight therefore were not liable. The Court there expressed their opinion that the repairs must be done within a reasonable time; and that no doubt would be so; but, unless the owner failed to complete them within a reasonable time, there would be no breach of contract by him. In that case it was also held that, so long as the vessel is capable of completing the voyage and thus earning the freight, neither the question of profit and loss to the owner nor of the length of time required to deliver the cargo, can so excuse the surrender without payment of freight as to render the insurers liable as for a loss; and that neither an injury to the vessel not sufficient to create a total loss, but repairable within a reasonable time, nor the act of God in closing navigation by ice, would authorize the abandonment of the voyage; but that either would authorize a detention of the goods until the voyage could be completed.

(1) 5 Hands Ap. Cas. (now cited, by authority, as 44 New York Rep.) 437.

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The case of *Blasco v. Fletcher* (1) was relied upon by the plaintiff. It was an action for the freight of goods which during the voyage and in consequence of serious damage to the ship had been taken possession of by the charterer and sold by him: but the decision really turned upon the point, whether the charterer had authority from the ship-owner to act as he had done, and which depended upon whether he had adopted a reasonable course under his special authority; and, he having so acted and adopted a reasonable course for the interests of all parties, it was held that no claim for freight could be maintained. I fail to see the application of that decision to the present case.

The case of *Geipel v. Smith* (2), which was also relied upon by the plaintiff, turned entirely upon the exception in the charterparty of the "restraint of princes:" and it was held that, by reason of that exception, a blockade which prevented the defendant (the ship-owner) from proceeding to the port of discharge, absolved him from doing so, or even from loading; and, à fortiori, where by reason of the blockade the charterparty could not (as was alleged in one of the pleas demurred to) have been carried out within a reasonable time. The defendants, the ship-owners, in that case, were held to be wholly excused by the terms of the charterparty from proceeding to deliver the cargo if loaded, and therefore it was considered to be useless for them to load, and that they were absolved from doing so. The expressions to be found in the judgments in that case as to reasonable time must, I think, be considered to have reference to the particular allegations in one of the pleas to that effect.

There are, no doubt, cases where delay which frustrated the object of a contract has been held to absolve a party from the further performance of it; but that is only where there has been some default or breach of contract by the other party as to a stipulation which was not in the nature of a condition precedent, and would not, but for such frustration of the adventure, have gone to the whole consideration or have afforded an excuse in law for the breach of contract complained of. The cases of *Havelock v. Geddes* (3), *Freeman v. Tyler* (4), and *Tarrabochia v. Hickie* (5), were all cases where

(1) 14 C. B. (N.S.) 147; 32 L. J. (C.P.) 284. *98 L. J. 1165*

(2) Law Rep. 7 Q. B. 404.

(3) 10 East, 555.

(4) 8 Bing. 124.

(5) 1 H. & N. 183; 26 L. J. (Ex.) 26.

there had been a breach or default by one of the parties; and the question arose as to the effect of such breach if it frustrated the whole object of the contract: but I am not aware of any case in which the mere frustration of the voyage by an unforeseen circumstance, where there has been no breach or default, has been held to absolve either party from his engagement.

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The observations of several of the learned judges in *Rankin v. Potter* (1), in the House of Lords, are certainly deserving of great consideration with reference to the obligation of a charterer to load a cargo where, upon a ship becoming disabled, the necessary repairs are likely to cause considerable delay and inconvenience to him. But, on the other hand, the consequences to the ship-owner if a charterer were at liberty to throw up the contract under such circumstances might, and in many instances would, be very serious with reference not only to the engagements into which the ship-owner had entered with the crew and other persons connected with the voyage, but also with reference to further charters and engagements of the vessel which might be dependent on the first charter.

It seems to me almost impossible to determine the rights or obligations of the parties upon any principle or doctrine of convenience, which must vary in almost every case, and might affect the respective parties to the contract so very differently; and the only safe rule, as it seems to me, is, to abide by the general principles of law and the cases that have been decided. Those decisions have, as far as I am aware, been uniform, that a charterer is not discharged where the delay arises from an excepted cause, and where there has been no breach of contract or default by the ship-owner. I am not aware of any decision to the contrary, although expressions may be found in some of the cases to that effect; nor have I been able to discover any authority for saying that a ship-owner who makes a contract to proceed with convenient speed (sea perils excepted) comes under any obligation that his ship shall arrive within a reasonable time with reference to the business of the charterer; and I cannot find any clear ground of mutual convenience in such cases which should induce the Courts to lay down such a rule. It also appears to me that, if any such doctrine were

(1) Law Rep. 6 H. L. 83.

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allowed to prevail, it would give rise to great confusion, and no one would know, when once a ship was disabled, what the effect would be on her engagements, or what course ought to be taken either by the owner or the charterer. Where parties desire to protect themselves against contingencies, they can always do so by express provisions; and, if they omit to adopt this precaution, and especially when such contingencies are provided for by being excepted from the contract, they have no good ground for complaint if they suffer inconvenience or loss by being held to the terms of their contract.

Where, from the nature of the contract, circumstances occur which make its provisions altogether inapplicable, it may be admitted that the contract has no longer any effect: but that doctrine, as it seems to me, does not apply to a case like the present, where the vessel might and ought to have been repaired, and where the cargo of iron could have been loaded and carried to its destination, and where the contract might thus have been fully performed on both sides, and where the contingency which has occurred of damage to the vessel by sea perils was specially contemplated and provided for in the contract itself.

In answer to questions put by the learned judge, the jury found that the time necessary for getting the ship off and repairing her was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time, and so long as to put an end in a commercial sense to the commercial speculation entered upon by the ship-owner and the charterers.

If the general views which I have stated with respect to the law applicable to this case be correct, then I apprehend these findings by the jury are wholly immaterial, and that the defendants, notwithstanding what the jury have so found, would be entitled to our judgment: but, as such findings of the jury seem to have proceeded mainly upon the intention and object of the charterers in agreeing to load the vessel, it appears to me that they cannot consistently with the view of the law which I have ventured to express be supported in point of fact.

The underwriters do not insure against mere delay or its consequences, nor against wrongful breaches of contract or the voluntary surrender of a charterparty; and, assuming that the charterers

were not justified in their refusal to load the vessel under the charterparty, then it is clear there is no loss of freight by any of the perils insured against. The vessel was not wholly lost, but might and ought to have been repaired; and she would then have been capable of completing the voyage and earning the freight.

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The probable delay in this case was provided for and excepted by the express terms of the charterparty; and there was consequently no breach of any condition or warranty,—no default or breach of the charterparty by the plaintiff; and not even a breach of any stipulation in the contract for which an action for damages could have been maintained against him; and therefore in my opinion nothing to justify the charterers on that ground, or under the provisions of the charter, in refusing to carry it out.

If the charterers were not entitled,—as I think they were not,—to throw up the charter, then the remedy of the plaintiff for the freight is against them (unless he has precluded himself from that remedy by assenting to the abandonment of the charter), and not against the underwriters: and I think, under the circumstances, that, upon this point, the view which my Brother Brett originally took at the trial was correct, and that our judgment ought to be for the defendants. My two learned Brothers, however, being of a different opinion, the judgment of the Court will be entered for the plaintiff.

The rule will therefore be absolute to enter the verdict for the plaintiff in the first action, for a partial loss on the ship, the amount of which loss is to be ascertained by an average-stater, as arranged between the parties; and also to enter the verdict in the second action for the plaintiff as for a total loss of the freight.

Rule absolute accordingly.

Attorney for plaintiff: *Norris.*

Attorneys for defendants: *Field, Roscoe, Field, Francis, & Osbaldiston, for Bateson, Robinson, & Morris, Liverpool.*

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July 15.

EBSWORTH AND OTHERS v. THE ALLIANCE MARINE INSURANCE COMPANY.

Marine Insurance—Insurable Interest—Extent of Right of Consignees (under Advances) to insure and recover in their own Names.

9CB188
10CB60
6PC232
10QB.253
10CB.611.
10AppCas119
2CTD.382
The plaintiffs, merchants in London, were in the habit of receiving consignments of cotton from correspondents abroad, and amongst others from Bell & Co., of Bombay, making advances thereon by acceptances against the consignments. For the purpose of covering these consignments and their advances, the plaintiffs effected open floating policies with the defendants, an insurance company, expressing that the insurances were made by them "as well in their own names as for and in the name or names of all and every person and persons to whom the same doth, may, or shall appertain, in part or in all." Each of the policies so effected was for 5000*l*. "on cotton, &c., from Bombay to London," &c., "by ship or ships;" and, as the plaintiffs received advices of the shipments, they declared upon the policies, in the usual way, the particulars and value of the goods and the names of the vessels by which they were shipped.

On the 29th of April, 1870, Bell & Co. advised the plaintiffs of the shipment of 250 bales of cotton on board the *Aurora*, and of their having drawn upon them for 3000*l*., at six months' sight, on account of that shipment, and requesting them to insure the cotton. This bill was negotiated by Bell & Co. through the National Bank of India, with whom the shipping documents were lodged as security. The bill, with the shipping documents annexed, was transmitted by the bank to their manager in London, and on the 21st of May the plaintiffs accepted it "against delivery of shipping documents" for the cotton.

With the assent of the National Bank, the 250 bales of cotton per *Aurora*, valued at 5000*l*., were on the 23rd of May declared by the plaintiffs (who thereby intended to insure for Bell & Co. and themselves) upon two open policies which they then had running with the defendants; and the plaintiffs wrote to the bank undertaking "to hold the amount insured at their disposal until payment of their acceptance for 3000*l*. due 24th November."

The *Aurora* left Bombay with the cotton on board, and was lost at sea on the 11th of June.

The plaintiffs afterwards paid their acceptance and received the bill of lading for the cotton.

In an action upon the policies to recover for the loss of the goods, the declaration averred that the plaintiffs caused themselves to be insured, that they or some or one of them were or was interested in the goods to the amount of all the moneys by them insured thereon, and that the insurances were made for the use and benefit and on account of the person or persons so interested. The defendants traversed these allegations:—

Held, by the whole Court, that the plaintiffs were entitled to recover upon these policies to the extent of their advance.

And held, by Bovill, C.J., and Denman, J. (the Court being by agreement at liberty to draw inferences of fact), that the plaintiffs had an equitable interest in every part of the cotton as security for their liability under their acceptance, and,

being also consignees to manage the consignment, they were entitled to insure the whole of it in their own names, and to its full value, and that, having intended by the insurances to cover the interests of all parties in the cotton, they were entitled to recover the whole amount upon a declaration averring interest in themselves; and that they would hold any surplus beyond their advance, as trustees for the other parties beneficially interested; and that their right to insure and to recover was not limited to their own beneficial interest in the goods.

Held, contra, by Keating and Brett, JJ., that the plaintiffs were not entitled to recover under these policies, in their own names, anything beyond their actual advance,—the only interest they had in the cotton being a right by an existing contract to have the bill of lading indorsed to them on payment of their acceptance, so as to enable them to sell the cotton to pay themselves 3000*l.* and their expenses, and to earn their commission, and to hold the surplus proceeds as agents for the consignors; and they being at the time of the loss neither legal owners of the cotton nor in equity trustees as to the surplus for the consignors.

The plaintiffs, cotton-brokers and agents in London, were in the habit of receiving from various correspondents abroad, and, amongst others, from Messrs. Robert Bell & Co., merchants at Bombay, consignments of cotton for sale, making advances thereon by acceptances as they were from time to time advised of the shipments. The cotton so consigned to them the plaintiffs insured (sometimes with and sometimes without specific orders from their principals) by declaring them in the usual way upon open policies with the defendants and other underwriters. These policies were effected by the plaintiffs, under the firm of Irving, Ebsworth, & Holmes, “as well in their own names as for and in the name or names of all and every person or persons to whom the same doth, may, or shall appertain in part or in all,” and each of the policies was for 5000*l.* “on cotton, lost or not lost, from Bombay to London or Liverpool direct or *viâ* Havre, in ship or ships.”

Having in May, 1870, received from Bell & Co. advice of the shipment of 250 bales of cotton per *Aurora*, consigned to them on the joint account of Bell & Co. and one Cursondas Madhowdass, and of Bell & Co. having drawn upon them at six months’ sight for 3000*l.* on account of that shipment, under the circumstances more fully detailed in the judgments of the Court post, pp. 602 and 632, the plaintiffs, in pursuance of instructions from Bell & Co., declared the cotton so consigned to them upon two of their open policies dated respectively the 23rd of November, and the 17th of December, 1869. The plaintiffs accepted the bill “against the

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shipping documents for the cotton per *Aurora*," and paid it at maturity, and received the bill of lading: but this was after the loss of the cotton. The *Aurora* left Bombay with the cotton on board, and both ship and cargo were totally lost on the 11th of June, 1870.

In declaring upon the policies, the plaintiffs alleged their interest as follows, viz. "that the plaintiffs or some or one of them were or was interested in the said goods to the amount of all the moneys by them insured thereon, and that the said insurance was made for the use and benefit and on account of the person or persons so interested." The pleas traversed the allegations that the plaintiffs caused themselves to be insured as alleged, and that the goods or any part of them were shipped as alleged; and there was also a plea (the third) alleging that "the plaintiffs were not, nor were any nor was either of them, interested in the said goods, nor was the said insurance made for the benefit of the persons or person so interested as alleged."

The cause was tried before Keating, J., at the sittings at Guildhall after Hilary Term, 1872, when a verdict was found for the plaintiffs for the whole amount insured, subject to leave reserved to the defendants to move to enter the verdict for them, if the Court should be of opinion that the plaintiffs had not an insurable interest in the subject-matter of the insurance as alleged in the declaration; or to reduce the damages to 3000*l.* in the event of the Court being of opinion that the interest alleged and proved, and the plaintiffs' right to recover, was limited to the amount of their actual advances.

Sir John Karlake, Q.C., in Easter Term last, obtained a rule nisi, against which cause was shewn on the 20th, 21st, and 22nd of November, 1872, and the 28th of January, 1873.

H. James, Q.C., and *Watkin Williams, Q.C.*, for the plaintiffs, contended that the plaintiffs had the whole legal interest in the goods when they accepted the draft for 3000*l.*; that all their duty to the consignees from that time was to account as trustees for them for the surplus proceeds; and that, assuming that not to be so, they still had such an interest in the goods and in every part of them as gave them an insurable interest in the whole, so as to

entitle them to insure them to their full value in their own names, holding the surplus (if any) above their own actual beneficial interest in the goods as trustees for the consignors. They cited and commented upon the following authorities :—*Bell v. Bromfield* (1); *Bell v. Ansley* (2); *Hiscox v. Barrett* (3); *Wolff v. Horncastle* (4); *Page v. Fry* (5); *Cohen v. Hannam* (6); *Lucena v. Craufurd* (7); *Carruthers v. Sheddon* (8); *Sparkes v. Marshall* (9); *Hunter v. Leathley* (10); *Watson v. Swann* (11); *Waters v. Monarch Insurance Co.* (12); *London and North Western Ry. Co. v. Glyn* (13); *Joyce v. Swann* (14); *North British and Mercantile Insurance Co. v. Moffatt* (15); *Stephens v. Australasian Insurance Co.* (16); 2 Duer on Insurance, 22, 29, 74.

Sir John Karslake, Q.C., J. C. Mathew, and Cohen, for the defendants, contended that the plaintiffs had no insurable interest at all in the cotton, but a mere expectancy of profit resting on a contingency; that, if they had any insurable interest at all, it could only be to the extent of their own beneficial interest therein, viz. 3000*l.*; that they could only insure in their own names and on their own behalf to the extent of that beneficial interest; and that the only persons who, without having a beneficial interest in goods equal to the whole value, can insure in their own names to the full value, and recover the whole value, holding the surplus as trustees, are those who are in law owners and in equity trustees of the goods insured, which the plaintiffs in this case were not. They cited and commented upon the following authorities :—*Robertson v. Hamilton* (17); *Ex parte Waring* (18); *Wolff v. Horncastle* (4); *Lucena v. Craufurd* (7); *Powles v. Hargreaves* (19); *Irving v. Richardson* (20); *Stockdale v. Dunlop* (21); *Sutherland v.*

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| (1) 15 East, 364. | (12) 5 E.&B. 870; 25 L. J. (Q.B.) 102; |
| (2) 16 East, 141. | (13) 1 E. & E. 652; 28 L. J. (Q. B.) |
| (3) Cited 16 East, 145. | 188. <i>Spm N.S. 1004</i> |
| (4) 1 B. & P. 316. | (14) 17 C. B. (N. S.) 84. |
| (5) 2 B. & P. 240. | (15) Law Rep. 7 C. P. 25. |
| (6) 5 Taunt. 101. | (16) Ante, p. 18. |
| (7) 3 B. & P. 75; 2 B & P. (N.R.) 269. | (17) 14 East, 522. |
| (8) 6 Taunt. 14. | (18) 19 Ves. 345. |
| (9) 2 Bing. N. C. 761. | (19) 3 M. D. & De G. 430; 23 L. J. |
| (10) 10 B. & C. 858. | (Ch.) 1. |
| (11) 11 C. B. (N. S.) 756; 31 L. J. | (20) 2 B. & Ad. 193. |
| (C.P.) 210. | (21) 6 M. & W. 224. |

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Cur. adv. vult.

July 15. BOVILL, C.J. I regret to say that, after the very able arguments of the learned counsel on both sides, and the assistance which we derived from them, and after much consideration on our part, the members of the Court who heard the argument are equally divided in opinion as to the result. I will first deliver judgment on behalf of my Brother Denman and myself.

The action was brought upon two policies of insurance, to recover a loss upon cotton shipped at Bombay for Liverpool by a vessel called the *Aurora*. Both policies were effected by the plaintiffs in their own names, under the firm of Irving, Ebsworth, & Holmes, and were two of a series of insurances which they had effected in the usual course of their business. The plaintiffs were brokers and agents engaged in the cotton trade in London, and were in the habit of receiving consignments of cotton from Bombay for sale on behalf of the shippers, who drew bills upon the plaintiffs against the consignments. These bills were usually negotiated in India, with the bills of lading attached as security, and were then remitted to this country. The holders of the bills on their arrival here presented them to the plaintiffs for acceptance, and the plaintiffs accepted them against delivery of the shipping documents; their security being the goods in respect of which the bills were drawn. The holders of the bills of lading had no further interest in them or in the goods which they represented than as security for payment of the bills drawn upon and accepted by the plaintiffs, subject to which, the plaintiffs had the right to the bills of lading as security for the amount for which they had come under acceptance against the consignment; and they had also the

- (1) 11 M. & W. 296; 12 M. & W. 17. (4) 1 E. & E. 652; 28 L. J. (Q. B.) 188. *5 June MS. 1004*
 (2) 9 C. B. (N.S.) 214; 30 L. J. (C.P.) 156. *7 June MS. 395*
 (3) 5 E. & B. 870; 25 L. J. (Q. B.) 102. *2 June MS. 375*
 (5) Law Rep. 7 Ex. 14.
 (6) Law Rep. 8 Ch. Ap. 220.
 (7) Law Rep. 3 P. C. 594.

right to sell the goods for their reimbursement, as well as to earn their commission upon the sales, and had generally to manage the consignment.

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The plaintiffs were in the habit of effecting insurances with the defendants to cover goods thus consigned to them; and the policies, including those now sued upon, were all in the same form, expressing in the usual way that they were made by the plaintiffs "as well in their own names as for and in the name or names of all and every person or persons to whom the same doth, may, or shall appertain in part or in all," and were each for 5000*l*. "on cotton and [or] produce from Bombay to London or Liverpool direct or viâ Havre," "by ship or ships," and at the rate or premium per cent. stated in each policy. As the plaintiffs received advices of the shipments, they declared to the defendants, and upon the policies, the particulars and value of the goods and the names of the vessels by which they were shipped.

The terms on which goods were to be shipped are contained in the following extract of a letter from the plaintiffs to Messrs. Robert Bell & Co., of Bombay, dated the 28th of October, 1869:—

"Our previous letters of credit for advances on cotton to our consignment having expired, we beg leave to renew the same, as follows:—

"You are by the present authorized to value on us at usance at the rate of 10*l*. sterling per bale of cotton, cost f. o. b. and freight, against shipping documents and *timely insurance orders* or policies of insurance; and we engage to accept your drafts so drawn on presentation, and to pay the same at maturity, or previously, at our option, under discount.

"The shipments not to exceed 200 bales cotton by any one vessel, and the present credit to be limited to 30th April next, unless previously withdrawn."

On the 28th of April, 1870, Messrs. Robert Bell & Co. in Bombay shipped 250 bales of cotton on board the *Aurora* for Liverpool, under bills of lading making the goods deliverable to them or order, and the freight to be paid at the port of discharge.

On the 29th of April, Messrs. Robert Bell & Co. wrote to the plaintiffs, as follows:—

"We have now the pleasure to inform you that we have induced

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Mr. Cursondas Madhowdass (respectable merchant of this place) to ship in joint account with ourselves 250 bales new Dho Uera cotton per ship *Aurora* (freight 1*l.* per ton), and against this shipment we have valued upon your good selves by this opportunity, through the National Bank of India, p. 3000*l.*, at six months' sight (ex. 1*s.* 11½*d.*), to which we crave your kind protection. Sample of this shipment goes forward over land to your address by this mail.

"We hope this cotton will arrive with you at a very favourable opportunity; and, confiding the same to your care and attention, and referring to the accompanying letter for market information, we remain, &c.,

"Robert Bell & Co."

There was a further shipment by Messrs. Robert Bell & Co. of 250 other bales of cotton by the same vessel; and upon the whole of the cotton Messrs. Bell & Co. had advanced Cursondas Madhowdass a sum of 6000*l.*

A bill of exchange for 3000*l.* in respect of the 250 bales first mentioned was drawn by Robert Bell & Co., payable to their own order, upon the plaintiffs, and payable at six months after sight.

This bill of exchange was indorsed by Robert Bell & Co., and then discounted by them with the National Bank of India in Bombay; and at the same time, as security for the acceptance and due payment of the bill, Messrs. Robert Bell & Co. placed in the hands of the bank the bills of lading for the 250 bales of cotton against which the bill of exchange was drawn. The following letter was also signed by Robert Bell & Co., and given to the National Bank of India:—

"To the Manager of the National Bank of India, Limited.

"Bombay, 28th April, 1870.

"Sir,—Having this day negotiated to you one bill of exchange drawn by us on Messrs. Irving, Ebsworth, & Holmes, of London, the particulars of which are noted at foot, and having at the same time as collateral securities for the due payment of the said bill indorsed to you the bills of lading and handed to you the shipping documents of the several goods, also stated at foot,—we hereby authorize you or any of your managers or agents, if you or he shall think fit, at our expense to insure the above goods from sea risk, including loss by capture, and also from loss by fire on shore,

in case Messrs. Irving, Ebsworth, & Holmes (the plaintiffs) shall omit to do so immediately after notice from you to that effect, and to add the premiums and expenses of such insurances to the amount chargeable to us in respect of the said bill.

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“We also authorize you or any such manager or agent, if you or he shall think fit, to sell any portion of the said goods which you or he may deem necessary, for payment of freight and of such premiums and expenses of insurance, and to take such charges for commission as in ordinary cases between a merchant and his correspondent.

“We also authorize you and the holders of the above bills for the time being to take, if you or they shall think fit, *conditional acceptances* to all or any of such bills, to the effect that, on payment thereof at maturity, the above-mentioned bills of lading and shipping documents shall be delivered to the drawees or acceptors thereof; such authorization on our part to extend to cases of acceptance for honor.

“We further authorize you or any of your managers or agents, on default being made in acceptance on presentment or in payment at maturity of any of the above bills, to sell the said goods or a competent part thereof, and to apply the net proceeds (after deducting usual commission and charges), as far as they will go, in or towards payment of such bills, with re-exchange and charges, and to retain the surplus balance, if any, and place the same against any other of our bills which may at the time be in your hands; and, subject thereto, we request you to account for such surplus, if any, to the proper parties.

“We further authorize you or the holders of the said bills for the time being at any time before their maturity to accept payment from the drawees or acceptors thereof, if required so to do, and on payment to deliver the said bill of lading and shipping documents to such drawees or acceptors; and we request that you or the holders of the said bills will allow, if required, in that event, discount thereon for the time such bills may have to run, at the Bank of England minimum rate of the day, if taken up in London, or if in ———, at the current rate of discount of the day on government acceptances in ———, but not to exceed the rate of 5 per cent. per annum. (Signed) “Robert Bell & Co.”

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“Bills and documents above referred to,—

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	Date.	Amount.	Drawee.	Bill of Lading.	Name of Ship.
	Ap. 28, 1870.	3000 <i>l</i> .	Messrs. I., E., & Holmes.	250 bales cotton, R. B. & Co.	<i>Aurora</i> .

Messrs. Robert Bell & Co. at the same time also handed to the National Bank an order for insurance addressed to the plaintiffs, in the following terms:—

“Bombay, 28th April, 1870.

“Messrs. Irving, Ebsworth, & Holmes, London.

“Dear Sirs,—We have to request you will effect English insurance on 250 bales of cotton shipped by us per *Aurora* for Liverpool, to the extent of 20*l*. per bale, and will thank you to deliver the policy to the National Bank of India, London, with their lien duly secured thereon, to be held by them until payment of our draft on you for 3000*l*., dated 28th April, 1870. We beg to add that, should you omit to effect insurance, the bank will be at liberty to insure the shipment for their own protection, and recover the cost from you before giving up the bill of lading.

(Signed) “Robert Bell & Co.”

The letter of hypothecation was countersigned by Cursondas Madhowdass, who was interested with Bell & Co. in the adventure; and he also indorsed the bill of exchange, and wrote and gave to the National Bank a letter addressed to the plaintiffs (but which was not shewn to them until after payment of their acceptance), in the following terms:—

“Bombay, 29th April, 1870.

“Messrs. Irving, Ebsworth, & Holmes.

“Gentlemen,—I beg to advise you that I have shipped to your care, through Messrs. Robert Bell & Co. of this place, the under-mentioned cotton; and I inclose invoice thereof, amounting to R.38,981. 6. Against the same I have drawn upon you as at foot, with the indorsement of the above-mentioned firm, and I beg your kind protection to my draft. I shall also feel obliged by

your effecting insurance to the extent of 18*l.* p. B. (eighteen pounds per bale). On arrival of the shipment, please sell it to the best advantage, remitting to me any balance that may be due hereafter. Should, however, the net proceeds fall short of the amount of your acceptance, together with any charges that may have been incurred by you, I hereby authorize you to draw upon me at usance for the difference, and I agree to honor any such draft or drafts that may be passed upon me, and also to accept as correct all accounts that may be rendered.

(Signed) "Cursondas Madhowdass."

Then followed particulars of the shipment, describing by marks the 250 bales new Dho Uera, per *Aurora*, and bill dated 28th April, 1870, for 3000*l.*, adding, "The cotton sample sent to you represents fair average quality of the 250 bales."

No bill of exchange, however, was drawn by Cursondas Madhowdass in respect of the 250 bales of cotton now in question.

The National Bank of India remitted the bill of exchange for 3000*l.* and the other documents which had been given to them by Robert Bell & Co. to the chief manager of their bank in London.

The bill of exchange was presented to the plaintiffs for acceptance on the 21st of May, and they gave a conditional acceptance, as contemplated by the letter of hypothecation, in the following terms: "Accepted, 21st May, 1870, against delivery of shipping documents for 250 bales cotton per *Aurora*. Irving, Ebsworth, & Holmes."

The order for insurance from Messrs. Robert Bell & Co. was also shewn to the plaintiffs by the National Bank; and it was arranged between them that the 250 bales of cotton per *Aurora* should be declared by the plaintiffs upon their open policies with the defendants' company, which were then running.

At this time the plaintiffs had effected two open policies with the defendants for 5000*l.*, one of which was dated the 23rd of November, 1869, and the other the 17th of December, 1869; and, as there remained a balance of 846*l.* not declared for, upon the November policy, the plaintiffs declared that amount upon that policy, and a declaration, following other similar declarations, was made on the policy, under the general heading of "The interest attaching to the within policy is hereby declared to be shipped and valued as under," as follows, viz.:

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"23/5/70. per *Aurora* to Liverpool direct. [Marks] 250 bales of cotton valued at 5000*l.*, attaching to this policy 846*l.*"

A similar declaration of interest was indorsed upon the December policy, stating it to be "Per *Aurora*, balance from preceding policy on 250 bales cotton, valued at 5000*l.*, 4154*l.*"

These are the policies upon which the plaintiffs are now suing in this action.

The plaintiffs then sent the following letter to the National Bank of India :—

"London, 27th May, 1870.

"To the chief manager of the National Bank of India, Limited, London.

"Sir,—We beg to inform you that we have declared on our open marine policies for 5000*l.* dated 23rd November, 1869, 5000*l.* dated 17th December, 1869, effected with the Alliance Insurance Company, the following shipments from Bombay to Liverpool, as per specification at foot ; and we hereby undertake and guarantee to hold the amount insured at your disposal until payment of our acceptance for 3000*l.* due 24th November.

(Signed) "Irving, Ebsworth, & Holmes."

"Goods, 250 bales cotton, R. B. & Co. ; Ship, *Aurora* ; Amount declared, 5000*l.*"

The *Aurora* left Bombay on the voyage in question, and was lost at sea on the 11th of June, 1870, and there was a total loss of the cotton.

On the 24th of November following the plaintiffs paid their acceptance at maturity, and received from the National Bank the bill of lading, which until that day had remained with the bank as security for payment of the acceptance.

The declaration contained averments (which were traversed) that the plaintiffs or one of them were or was interested in the goods to the amount of all the moneys by them insured thereon, and that the insurances were made for the use and benefit and on account of the person or persons so interested ; and the question discussed upon the argument depended upon the issues thus raised. There was also a denial of the plaintiffs having caused themselves to be insured.

It was agreed on the argument that the Court should be at

liberty to draw such inferences of fact as a jury should have drawn; and power was reserved to the Court to amend the pleadings, if necessary.

Upon the facts proved at the trial, it appears to us that the shipment in question was one of that description which was intended to be covered by, and which the plaintiffs were at liberty to declare upon, their floating policies. From the nature of the transactions in which they were engaged, their object in keeping on foot a succession of open policies must have been to cover shipments which might from time to time be consigned to them; and both they and the underwriters must, we think, be taken to have contemplated that the transactions would be conducted in the usual course of business, which is, that, when goods are so consigned, bills of exchange would be drawn upon the plaintiffs by the shippers, which would or might be negotiated to third parties with the bills of lading attached as security.

Before the bill of exchange in this case was accepted, the bill of lading and the goods which it represented would be a security to the holders of the bill of exchange, and the plaintiffs would have no present interest in them; but, as soon as the plaintiffs accepted the bill, they became bound to pay it upon the shipping documents being delivered to them: *Smith v. Vertue* (1): and, in the ordinary course of business, when the bill arrived at maturity, upon the plaintiffs paying the amount, the bill of lading would be handed to them. It was also contemplated, as appears by the concluding part of Messrs. Bell & Co.'s letter to the National Bank, of the 28th of April, 1870, that the plaintiffs might desire to take up the bill of lading and pay the amount of their acceptance before maturity, and this would be in accordance with the usual course of business, in order to enable the plaintiffs, as consignees for the shippers, to take advantage of a favourable market and to make immediate sales of the cotton.

The bill of exchange being drawn by the shippers, and accepted by the plaintiffs against the consignment, that consignment immediately became an equitable security to the plaintiffs for the amount of their acceptance; and they would have been entitled in equity to have the cotton appropriated for their reimbursement:

(1) 9 C. B. (N.S.) 214; 30 L. J. (C.P.) 56.

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Ex parte Barber (1); *Ex parte Mackey* (2); and see also the recent case before the Lords Justices, of *Ex parte Smart* (3), and *Bank of Ireland v. Perry*. (4) The plaintiffs would further be entitled to their commission on the sale of the goods, and also to be reimbursed the cost of the insurance, and their other expenses in respect of the consignment; and it was their business to sell, manage, and dispose of the cotton as consignees. The equitable interest of the plaintiffs, after coming under acceptance against the shipment, was not in any particular portion of the cotton, but in the whole and in every part of it; and no portion of it could have been withdrawn without diminishing their security. They had also the power to sell and dispose of every portion of it, and to receive the purchase money.

Under these circumstances, were they entitled to insure in their own names the whole of the cotton, and to its full value, or were they entitled to insure the cotton only to the extent of their personal liability under their acceptance?

It is clear that a mortgagee of goods by assignment would be entitled to insure the whole of the goods in his own name, and to their full value, and, in case of a loss, would be entitled to recover in his own name the full amount of the insurance, and would be a trustee for the mortgagor as to any surplus beyond the amount of his own debt. The plaintiffs, having an interest in every part of the cotton, would, as it appears to us, stand in the same position in equity as a strict mortgagee in a Court of law, and would clearly be entitled to insure themselves against the loss of the cotton, as affecting not only their security for reimbursement of the amount of their acceptance, but also their commission on the sale: but it also appears to us that, having an equitable security upon the whole of the goods and every part of them, and the duty of selling and managing the consignment, they might, *if it was so intended*, insure in their own names, not only their own individual interest in the cotton, but also the interest of the other parties interested, viz. the shippers (Messrs. Bell & Co.) and the National Bank of India.

(1) 3 M. D. & D. 174.

(2) 2 M. D. & D. 136.

(3) Law Rep. 8 Ch. 220.

(4) Law Rep. 7 Ex. 14.

Primâ facie, an insurance by a mortgagee, whether legal or equitable, would cover only his own particular interest in the goods; but, if the insurance was, as between him and the underwriters, intended to cover the interest of all parties and the whole value of the goods, there would be no objection to a legal mortgagee so insuring in his own name to cover all the interests and the entire value of the goods: and we think there is equally no objection to an equitable mortgagee, or a person who stands in a similar position, insuring in like manner. An insurable interest is clearly not confined to a strict legal right of property. It then becomes a question of fact what was the interest intended to be covered by the policy. If it was only the individual interest of the mortgagee, he could recover only the amount of that interest; but, if the insurance was intended to cover the interest of the mortgagor also, then he would be entitled to recover in his own name for both interests: see *Irving v. Richardson*. (1) In that case the assured, though a mortgagee of the ship, had under the Registry Acts no legal ownership, but only an equitable interest in it; and yet it was considered that he might insure and recover in his own name the whole amount, if the insurance was intended to cover the mortgagor's interest as well as his own; and that, whether it was so intended or not, was the proper question to be left to the jury in such a case: see also the observations of Parke, B., in *Sutherland v. Pratt*. (2)

Upon the facts of the present case, and having power to draw inferences, we can entertain no doubt that the insurances effected by the plaintiffs were intended to cover the whole interest of all the parties interested in the consignments. They seem to us to have been effected for that express purpose, and to have been so treated by all parties: and we think that they must be considered in that light. It is, we believe, the common practice of consignees and underwriters to have floating policies of this description, with a view of covering the interest of all parties in the goods; and it seems to us that as each shipment was declared the policies would enure for the benefit of the different parties who were interested in the goods so declared.

In this case, the cotton was declared by the plaintiffs under their

(1) 2 B. & Ad. 193.

(2) 12 M. & W. 17.

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floating policies after orders to insure from Bell & Co., and with the assent of the National Bank of India; and, upon the declarations being made, these policies would as to this shipment enure, not only for the benefit of the plaintiffs themselves, who were interested in the safety of the whole of the goods to cover their own liabilities and claims, but also for the benefit of the National Bank of India, to secure to them the amount of the acceptance, as well as for the shippers, as the persons entitled to the surplus proceeds of the goods when sold by the plaintiffs. There was also the very possible contingency that the goods when sold might not from various causes realize the amount for which the plaintiffs had come under acceptance.

Although the insurances would in our opinion, as they were intended to do, cover the whole value of the shipment, and all the different interests in the goods, yet, from the nature of these floating policies, and their being effected in anticipation of future transactions of the plaintiffs with various persons who were unknown at the dates when the policies were effected, they were necessarily effected by the plaintiffs in their own names; and it could not be said that as contracts they were made by the plaintiffs by order or for account or on behalf of persons who were then unknown, but who might at some future time consign goods to the plaintiffs. The consequence of this is, as it seems to us, that no action could be maintained upon the policies in question by or in the names of any persons except the plaintiffs: and, in this particular case, if it had been averred that Messrs. Bell & Co. were interested in the cotton, and that the insurances respectively were made for their use and benefit and on their account, we think that such an allegation would not have been maintained: *Watson v. Swann*. (1) Neither could it have been properly alleged that the plaintiffs and Messrs. Bell & Co., either with or without the National Bank of India, were *jointly* interested in the cotton, and that the policies were effected on their account; for no such joint interest existed, and the policies at the time they were made were not effected on their behalf: and the only proper conclusion in law from the facts, as it appears to us, is that the plaintiffs, having effected the policies in their own names to cover future consignments, such as

(1) 11 C. B. (N.S.) 756; 31 L. J. (C.P.) 210.

the cotton in this case, not only may, but must, sue upon the policies in their own names, and we think that the averments in this declaration, that the insurances were made for their use and benefit and on their account, and that they were the parties interested, were the proper, and, indeed, the only correct mode of framing the declaration.

It is quite true that Messrs. Bell & Co. had an interest in the cotton, and were, in fact, the general owners of it, subject to the rights which they had created on the part of the National Bank of India and the plaintiffs: but, as between the underwriters and the plaintiffs, the former must, we think, be taken to have agreed that the plaintiffs might declare goods consigned to them under circumstances like the present, upon the floating policies effected by them, and that they might recover upon them the full value in their own names.

There is no doubt that in a declaration the averments of interest, and as to the person on whose behalf the insurance is effected, must be correctly made, and that a variance in that respect would be fatal, though the interest is now allowed to be alleged alternatively in various persons. It is also not sufficient to aver the interest to be in another person, without also alleging that the insurance was made on his behalf. These averments likewise affect the evidence and right of discovery at law, though, where a plaintiff sues as trustee for another, a discovery might be had in equity from the cestui que trust, and relief obtained as against him.

It is quite true that, *after* the floating policies had been opened, and when the shipment was made, there was an order by Messrs. Bell & Co. to the plaintiffs to insure, and that by agreement with the National Bank of India the declarations of interest by the plaintiffs under these floating policies were to be treated as covering this cotton: but that would not entitle either Bell & Co. or the bank to sue upon the policies in their own names, or maintain an allegation that the policies were made on their behalf.

The law with respect to the insurable interest which a consignee may include in a policy and recover in his own name is, we think, correctly stated in the 3rd edition of Arnould on Insurance, at p. 72, in the following terms:—"As a general principle, then, there can

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be no doubt that consignees of the goods, being in advance to the consignors, or under acceptances for them, may insure in their own name and on their own account to the full value of the goods, and apply the proceeds of the policies to their own benefit up to the extent of their claims in respect of such advances and the acceptances, holding the residue in trust for the consignors."

The practice of the mercantile community as well as of underwriters has also, we believe, been entirely in accordance with this view of the law; and there is this manifest convenience in it, that it saves a multiplicity of insurances upon the same subject-matter, and avoids the necessity for any nice distinctions as to the precise nature of the various interests of the several parties which are intended to be covered by the particular insurance. This more especially applies to the case of floating policies effected by consignees to cover goods of all persons who may thereafter consign goods to them, and to similar floating policies which wharfingers, warehousemen, factors, and others are in the habit of effecting to cover the owners' interests as well as their own; and it seems to us that it would lead to great practical inconvenience if a different rule were now to be laid down.

Many of the passages which were cited for the defendants from text-writers had reference only to what a person might insure *on his own account*; and a great part of the argument for the defendants rested on the assumption that there was, in fact, an insurance in this case of the *separate* interest of Bell & Co., and that these policies were made by the plaintiffs as the agents of Bell & Co. and on their behalf; but which assumption, for the reasons before stated, we consider to be not well founded.

The case of *Robertson v. Hamilton* (1) is an important decision to shew that, where a person, having a limited personal interest in the safety of every portion of the subject-matter of insurance, insures not only that particular interest but the whole of the subject-matter to its full value for the benefit of the other parties who are interested in it as well as of himself, he will be considered entitled to recover the full amount in his own name upon an averment of interest in himself, and will be considered a trustee for the other parties interested. In that case the plaintiffs were owners of the

(1) 14 East, 522.

Ross, which, with another ship called the *Atlantic*, belonging to Fisher & Co., and their cargoes, had been captured as Spanish prize. The plaintiffs and the respective owners of the other ship and of the cargoes employed one Cowan as their agent in Spain to obtain restitution or compromise the claims of the captors and to send the property back to England. He effected an arrangement by giving up part of each cargo, and upon the terms that the two ships and the rest of the cargoes should be restored for the common benefit of the original owners of both ships and cargoes in the lump; and he drew a bill upon the plaintiffs (which was accepted and paid by them) for the general expenses of effecting the arrangement, and for the outfit of the vessels on their return homewards. The agent stated in a letter to the plaintiffs: "The whole property restored is to form a mass, and the reparation made agreeably to the respective values that may be affixed to both ships and cargoes. The *Atlantic* I shall consign to you, in order to simplify the concern; and you can arrange with the owners. The above information will guide you with respect to insurance." The plaintiffs then effected an insurance upon the *Atlantic*, and that vessel was again captured by the French. The plaintiffs thereupon sued in their own names to recover for a total loss of that vessel. It was held that the plaintiffs, though not the owners of the *Atlantic*, had an insurable interest in her and to the full amount of the insurances. In the course of the argument, when the case of *Lucena v. Craufurd* (1) was cited, Lord Ellenborough said (2): "Independent of that case, can there be any doubt but that the plaintiffs had an insurable interest? The ships and cargoes were all thrown into hotchpot; and the plaintiffs had an interest in the conjoint property, and had expended their own money upon it, and were further authorized to make the insurance, by Cowan, of Corunna, who had full powers of attorney from all the original owners of the property." And, upon its being argued that the ship insured never was in the possession of the plaintiffs, and therefore that they could have no lien on it (and which argument was also pressed upon us in this case), Lord Ellenborough said (3): "This is no question strictly of lien. Cowan was in possession of

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(1) 3 B. & P. 75; 2 B. & P. (N. R.) 269.

(2) 14 East, at p. 526.

(3) 14 East, at p. 530.

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the whole, and Cowan continued to be the plaintiffs' agent for this purpose after the *Atlantic* and the *Ross* were thrown into hotchpot for the benefit of all concerned. The whole then became a new property, and a new interest was constituted in the former several owners conjointly, so that the proprietors of the ship *Ross* thereby came to have an interest in the *Atlantic*. Upon the arrangement made with the captors, Cowan received restitution of the whole property in the lump, as it is said, for the common benefit of the original owners of both ships and cargoes; and then Cowan, being such agent of the conjoint interest as well as agent for the plaintiffs, consigned the *Atlantic* to them, and drew bills upon them for the general expenses of the whole concern, which they accepted and paid. If this does not give them an insurable interest, it is difficult to say what will." And, in giving judgment, Lord Ellenborough says (1): "The plaintiffs, having an insurable interest in the whole mass of the property restored, may recover upon this policy as trustees for those who are interested with themselves in the whole, though they may be afterwards called upon to divide it amongst the several claimants in the proportions due to each; and a recovery in this action will not exclude any of the parties from unravelling the account in equity." And again (2): "The assured, therefore, upon this policy are entitled to recover from the underwriters if they had an insurable interest in the ship. The question, then, is, who had such an interest? I answer, the original proprietors of both ships and cargoes, whose interest had been united in hotchpot through the medium of their common agent, Cowan. Cowan himself had an interest in the whole; and the plaintiffs had also an interest in respect of the bills which they had accepted and paid for Cowan on account of this conjoint property. The whole was thrown into hotchpot when it was delivered up to Cowan by the first captors; and therefore the plaintiffs, who were the original owners of the ship *Ross*, became interested in the whole. They were also interested in it as *the consignees and representatives of Cowan*, who had expended money upon the whole in hotchpot, and for whom they had accepted and paid bills on that account. It cannot, therefore, be said that the plaintiffs

(1) 14 East, at p. 532.

(2) 14 East, at p. 534.

had not an insurable interest in the subject-matter." It was held that the plaintiffs might insure and recover as for a total loss on the policy on the *Atlantic*, of which they were not the owners, though they might be responsible over to the owner of that vessel or his representatives for a proportion of the money when recovered. That case seems to us a very strong authority in favour of the plaintiffs in this action.

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A similar principle has been adopted and acted upon in the case of fire policies, where persons having a very limited personal interest, such as, a warehouseman in one case, having only a lien for his charges, and not being himself an insurer by law, and a carrier in the other, had effected and kept on foot floating policies for the purpose of covering, and which were considered to cover, not only their own individual interests but also the interests of the owners of the goods; and these persons were held to have insurable interests as against the insurers to the full value of the goods, and to have a right to recover the whole amount of the insurances in their own names, though they would be trustees as to any surplus beyond their own individual claims for the other parties interested: see *Waters v. Monarch Insurance Co.* (1) and *London and North-Western Ry. Co. v. Glyn.* (2)

It is true that those were cases of fire insurance, and upon policies which expressly covered "*goods in trust*;" but, if the policies in this case were intended to cover the interests of all parties in the goods, as we think they were, then they must be treated as if they had contained express words to include all such interests; and in that view the cases above cited would be quite analogous to the present, for the purpose of considering the other question, viz. whether the persons insuring had an insurable interest in and were entitled to recover the whole value of the goods in their own names. It is upon this latter point, viz. as to the nature and extent of the insurable interest and the right to recover the full amount, that these cases seem to us to have an important bearing upon the present question. In the case of the warehouseman (who is not an insurer), *Waters v. Monarch Life Assurance Co.* (1), Lord Campbell, C.J., after deciding that upon the proper

(1) 5 E. & B. 870; 25 L. J. (Q.B.)
102, 27 Feb 1875

(2) 1 E. & E. 652; 28 L. J. (Q.B.)
188, 5 Jan 1874

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construction of the policy the interest of the general owners of the goods was intended to be covered, proceeds as follows (1): "And I think that a person intrusted with goods can insure them without orders from the owner, and even without informing him that there was such a policy. It would be most inconvenient in business if a wharfinger could not at his own cost keep up a floating policy for the benefit of all who might become his customers. The last point that arises is, to what extent does the policy protect those goods. The defendants say that it was only the plaintiffs' personal interest. But the policies are in terms contracts to make good 'all such damage and loss as may happen by fire to the property hereinbefore mentioned.' That is a valid contract; and, as the property is wholly destroyed, the value of the whole must be made good, not merely the particular interest of the plaintiffs. They will be entitled to apply so much to cover their own interest, and will be trustees for the owners as to the rest." Crompton, J., also says (2): "The parties meant to insure those goods with which the plaintiffs were intrusted, and in every part of which they had an interest, both in respect of their lien and in respect of their responsibility to the bailors. What the surplus after satisfying their own claim might be, could only be ascertained after the loss, when the amount of their lien at that time was determined; but they were persons interested in every particle of the goods."

In *London and North-Western Ry. Co. v. Glyn* (3), where the plaintiffs were carriers, Wightman, J., says (4): "The question in this case is whether the plaintiffs are entitled under this policy to recover more than their own particular interest in the goods which they as carriers had in the warehouse when it was burnt. I think that they are, and that they ought to recover the full value of the goods. They must, in my opinion, be considered as having insured the goods which they held in trust as carriers, for the benefit of the owners, for whom they will hold the amount recovered, as trustees, after deducting what is due in respect of their own charges upon the goods." And, again (5): "It is true that this insurance is in the nature of a voluntary trust undertaken by the

(1) 5 E. & B. at p. 881.

(2) 5 E. & B. at p. 882.

(3) 1 E. & E. 652; 28 L. J. (Q.B.) 188.

(4) 1 E. & E. at p. 660.

(5) 1 E. & E. at p. 661.

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plaintiffs without the knowledge of the cestuis que trust, the owners of the goods; but it is a trust clearly binding on the plaintiffs in equity, who will hold the amount which they now recover, in the first place for the satisfaction of their own claims, and in the next, as to the residue, in trust for the owners. If a different construction was put on such a policy as this, it would be necessary, as my Brother Crompton has observed that several policies should be effected on the same goods, and thus insurance companies would obtain several premiums instead of one in respect of what to them is the same risk." Crompton, J., at p. 663 also states that, in his opinion, the plaintiffs intended to insure, first, their own interest, if any, in the goods, and secondly, the interest of their cestuis que trust, the owners of the goods, and that the case of *Waters v. Monarch Assurance Co.* (1) had established that persons who are the bailees of goods have an insurable interest in them as against the assurers to their full value, although the assured may be trustees for third persons of part of the amount recovered on the policy.

In the great case of the Dutch commissioners, *Lucena v. Craufurd* (2), the ultimate decision of the House of Lords awarding a venire de novo rested upon the ground that general damages had been assessed in one aggregate sum for *all* the vessels, whereas, one of them, having been lost after the declaration of hostilities, and thus become vested in the Crown, could not in any sense be considered within the jurisdiction of the commissioners. But, at the same time, the House of Lords expressed a clear opinion, adopting the views of Chambre, J., and Lawrence, J., that the commissioners had *not* an insurable interest. This was, however, on the ground that their authority was derived entirely from an Act of Parliament and a commission which gave them no power or right of interference or control over any of the ships or property until after they were detained or brought into the ports of this kingdom; that, up to that time, the control and power over the vessels rested entirely with the Crown; that the vessels might never have come under the power of the commissioners; that they had nothing more than a mere expectation or hope and possibility that the

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(1) 5 E. & B. 870; 25 L. J. (Q.B.) 102.

(2) 2 B. & P. (N. R.) 269.

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vessels might come under their control; and that they therefore had no insurable interest to support the policies which had been effected whilst the vessels remained abroad, and before they had been brought to this country. It was contended for the commissioners, the plaintiffs, in that case, that they had authority to sell, manage, and dispose of the vessels, and were therefore in a position similar to that of ordinary consignees, and entitled equally as such consignees to insure and recover the full amount of the insurances in their own names, under an averment of interest in themselves. It seems to us to have been considered by all the judges, as well as by the House of Lords, to be clear law that ordinary consignees having a beneficial interest in the whole subject-matter might recover the full sum insured, under an averment of interest in themselves; and that, if the commissioners could be considered as such consignees, they were entitled to recover. After the three arguments in the Exchequer Chamber (1), and the argument in the House of Lords, it was said by the majority of the judges (2) that no one ever questioned that an ordinary consignee having a beneficial interest might insure for the benefit of the owner of the goods, though a naked consignee, as he was termed, being a mere agent of the consignor, could not do so. But, as different views have been taken of the effect of the observations of the learned judges and of Lord Eldon (who, as Chief Justice of the Common Pleas, had heard the three arguments in the Exchequer Chamber) upon the subject of insurable interest of consignees generally, it may be useful to refer to those observations more in detail. They are as follows, viz. in the judgment of the majority of the seven judges in the Exchequer Chamber (3): "Independent, however, of these observations, it is not necessary that an insurer should have a beneficial interest in the property insured; it is sufficient if he be clothed with the character of a trustee, an agent, or a *consignee*; and, if these commissioners can be considered in either of these capacities, they have an insurable interest. According to the terms of the statute it seems as if they may be considered in either of these capacities. They may be considered as trustees for the Crown, or for the persons who shall be ultimately entitled to the property; as general agents for

(1) 3 B. & P. 75.

(2) 2 B. & P. (N. R.) at p. 292.

(3) 3 B. & P. at p. 95.

the purpose of disposing of the property on its arrival in England; or as statutable consignees." Again (1): "Suppose a merchant upon his marriage to covenant with trustees in his marriage-settlement, that certain ships then upon the sea should when they came to England be vested in them for the purposes of the settlement, are we to be told that the trustees might not insure, because the settlor did not in terms convey and assign over the ships immediately? A Court of equity would consider the interests in the trustees exactly the same as if the ships had been immediately conveyed. It is objected, however, that the Dutch commissioners did not resemble consignees, because they were directed to sell and dispose of the property intrusted to them according to the directions which they should receive from Government. But many consignees receive goods with orders to attend to the directions of the consignor as to their disposal; and yet they are not the less able to insure. So, every trustee is subject to the directions either of the cestui que trust or of the Court of Chancery." In the judgment of Chambre, J., whose views were ultimately adopted by the House of Lords, he says (2): "I am not disposed to question the authorities in general: on the contrary, there appears to me to have been great propriety in establishing the contract of insurance wherever the interest declared upon was in the common understanding of mankind a real interest in or arising out of the thing insured, or so connected with it as to depend on the safety of the thing insured and the risk insured against, without much regard to technical distinctions respecting property, still however excluding mere speculation or expectation, and interests created no otherwise than by gaming. What the parties themselves may do, they may also do by their trustees, *consignees*, or agents, provided the act done by an agent comes within the scope of the authority given him by his principal, either expressly or impliedly from the nature of his employment." In the House of Lords, in the opinions of the seven judges, and in which Thompson, B., concurred, the following passages occur (3): "It is with reference to these premises, they (the plaintiffs) aver that they as such commissioners were interested, and that the insurance was made for their use and benefit as commis-

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(1) 3 B. & P. at p. 97.

(2) 3 B. & P. at p. 104.

(3) 2 B. & P. (N. R.) at pp. 289, 290.

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sioners. The nature of their connection with the property insured appears from the previous part of the declaration. They claimed no beneficial interest in it; they were merely *consignees*, agents, or trustees for others; and, to make the whole declaration consistent, the averment must be taken to import, what the words will fairly admit, that the insurance was made for the benefit of those for whose benefit the plaintiffs were authorized by the Act of Parliament and commission to manage the property as consignees, that is, in the present instance, for the King. A consignee without any beneficial interest in himself is agent for the consignor, and may insure for his benefit; and, if such a consignee were to state in his declaration the circumstances of the consignment of goods to him to manage, sell, and dispose of for certain persons abroad, might he not aver the *interest* in himself *as such consignee*? and would not such an averment, coupled with the disclosure of his having no interest but for the consignors' use, be equivalent to an averment of interest in his consignors?" Again (1): "Though a consignee be usually appointed by bill of lading, it is not necessary to invest a person with that character. Mr. Justice Buller, in the case of *Wolff v. Horncastle* (2), defines a consignee to be a person residing at the port of delivery, to whom the goods are to be delivered on their arrival. A consignee, as distinguished from a vendee, is the mere agent of the consignor; and such a consignee may be appointed by any direction, verbal or written, to the captain, to deliver the goods to such particular person, or by a letter to the person himself requesting him to take care of the goods upon their arrival. Where, then, is the difference between such a consignee and these commissioners? The ships were directed by the person who had the possession and power to direct the voyage to Great Britain; and the commissioners were appointed to receive the ships and cargoes, and to manage and dispose of them upon their arrival. What is the effect of the most solemn appointment of a consignee different from this? What greater interest or closer connection with the ship does he acquire? If, then, there be no difference, *no one ever questioned that a consignee or agent of the description spoken of might make an insurance for the benefit of the owner and person entitled, and for whom he as consignee is autho-*

(1) 2 B. & P. (N. R.) at pp. 291, 292.

(2) 1 B. & P. 316, 322.

rized to act." . . . "At the time both of the insurance and the loss, their (the commissioners') title, like that of a consignee, was inchoate; occupancy was necessary to perfect it. It is true that their interest was revocable. But so is that of a consignee." Again (1): "And if it were now to be decided that the interest of these commissioners was not insurable, it would render unintelligible that doctrine upon which merchants and underwriters have acted for years, and paid and received many thousand pounds." Mr. Justice Chambre, who thought that the commissioners had no insurable interest, says (2): "The duties of their office were confined to Dutch property that was actually in the kingdom, and provisionally detained there under the King's authority. No matter who brings it in. They have nothing to do as commissioners with consignments from abroad; nor was any consignment in fact made to them. They have been called statutable consignees. If that phrase means anything, it must mean that the statute had consigned these particular ships to the commissioners; but, look at the statute, and we find nothing more than that it authorizes a commission under which whatever property of a certain description arrives, it will, if they continue commissioners, fall within their care and management officially, to prevent its perishing. But the Act had in no respect attached upon this property: it had only created a capacity to the plaintiffs in certain events to receive these or any other Dutch ships or merchandizes." Again he says (3): "A consignment is a species of mercantile conveyance operating upon the particular effects consigned, which, though it may be defeasible, may operate in the meantime, and enable the consignee by his acts to bind the consignor."

In the opinion of Lawrence, J., who also thought that the commissioners had not an insurable interest, and whose opinion was also adopted by the House of Lords, there are the following passages (4): "Conceiving for these reasons that the contract of marine assurance is not from its nature confined to protect the interest arising from the ownership of the subject exposed to risk insured against, I shall proceed to consider," &c. "Had they (the commissioners) been authorized generally to take care of ships

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(1) 2 B. & P. (N. R.) at p. 294.

(3) 2 B. & P. (N. R.) at p. 299.

(2) 2 B. & P. (N. R.) at p. 298.

(4) 2 B. & P. (N. R.) at p. 304.

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detained by His Majesty's orders, by the act of detainer the ships would have become objects of their concern, and from thence a duty might possibly have been inferred to take all proper steps to prevent any damage from their loss, and an averment that the defendants in error insured as such commissioners might have borne the meaning which has been contended for. But that cannot be understood in this case; for, the averment in effect refers their interest to the Act of Parliament and their commission, the terms of which respect only the case of ships and goods detained and brought into the ports of this kingdom: and I know not how to conceive an interest dependent on a thing with which thing the persons supposed to be interested have nothing to do. The defendants in error have been considered as trustees or consignees, who, it is said, have an insurable interest. *But I do not think they can be considered as trustees or as consignees* having such interest as will support this averment. A trustee who has an insurable interest must, as I conceive, have some existing right to the thing insured for the benefit of another; but the commissioners in this case had not any such right, and therefore cannot, according to my notions of a trustee, be considered as such. Nor can they be considered as *consignees* in whom any interest or right is vested by bill of lading or other instrument of consignment by which the property of the subject-matter of the consignment *primâ facie* will pass. If they be consignees, they were *naked* consignees for the purpose of doing some act respecting the goods consigned, and rather agents than consignees, according to the common understanding of that word; and, taking them to be *naked* consignees who have not the legal property of the subject-matter of the insurance, and who are not beneficially interested in it, they ought, I conceive, to have averred the interest to be in those on whose account the insurance was made, whether they were defined persons or uncertain persons, and not in themselves as commissioners; for, taking the meaning of the word interest to be what I have stated it to be, it is obvious that a *naked consignee* who means that the insurance should be applied to the protection of the things insured and the indemnification of him who suffers by losing the value of those things, his object being not to secure himself from some damage consequential to the loss, as his commission, but that others interested as proprie-

tors should be indemnified,—it is obvious, I say, that such consignee can himself suffer no prejudice by the total or partial destruction of a thing which forms no part of his property. In the safety of such thing such naked consignee can in this view have no interest. The persons prejudiced by the loss of property are his consignors, or those for whose benefit the property is to be disposed, and in them only in such case and in such light is there any interest.” (1).

Lord Eldon, in giving judgment in the House of Lords, says (2): “With respect to the case of a trustee, I can see nothing in this case which resembles it. A trustee has a legal interest in the thing, and may therefore insure. So, a *consignee* has the power of selling; and the same may be said of an agent. I cannot agree to the doctrine said to be established in the Courts below, that an agent may insure in respect of his lien upon a subsequent performance of his contract; nor can I advise your Lordships to proceed, without much more discussion, upon authority of that kind. There are different sorts of consignees: *some have a power to sell, manage, and dispose of the property, subject only to the rights of the consignor.* Others have a mere naked right to take possession. I will not say that the latter may not insure, if they state the interest to be in their principal.”

Lord Ellenborough and Lord Erskine concurred entirely in the views of Lord Eldon.

In the previous case of *Craufurd v. Hunter* (3), in the Court of King’s Bench, where precisely the same points arose, it was considered that the commissioners were in the nature of consignees, and had therefore a right to insure and to recover the whole sum insured in their own names; and it appears to us that the correct opinion to be collected from the observations of all the learned judges and also of the peers who took part in the judgment in the House of Lords in *Lucena v. Craufurd* (4), is, that an ordinary consignee, who has made advances or come under acceptance, and has a beneficial interest in the subject-matter, is entitled to insure to the full value and recover the whole sum insured, and to aver the interest to be in himself.

(1) 2 B. & P. (N. R.) at pp. 306, 307.

(2) 2 B. & P. (N. R.) at p. 324.

(3) 8 T. R. 13.

(4) 2 B. & P. (N. R.) 269.

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In *Carruthers v. Sheddon* (1), the plaintiffs by order from Dowrick & Way had effected an insurance upon coffee in which Dowrick & Way were interested to the extent of seven-sixteenths jointly with three other persons. The policy professed to be made by the plaintiffs as agents and by order of and for account of Dowrick & Way. The adventure was managed by Dowrick & Way, who made advances and paid what was required. Gibbs, C.J., held at the trial that, as Dowrick & Way were the managers of the adventure, if the policy was intended to cover the interests of the three other persons (of which the jury were to judge), the plaintiffs might, as the agents of Dowrick & Way, recover the whole amount insured; and he also thought "that Dowrick & Way, as consignees of the cargo, had an insurable interest to the whole amount, for that a consignee may insure as well as a principal:" and the Court confirmed his ruling. We are unable to discover any intimation of opinion by the Court in that case, or to see any inference that can properly be drawn from it, to the effect that a consignee who makes advances can insure and recover only to the extent of his own lien: and the language of Gibbs, C.J., which was adopted by the Court, seems to us to be exactly contrary to that view.

In *Godin v. London Assurance Company* (2), the only question was whether, where two persons having different interests had each insured by a separate policy, this was to be considered as a double insurance, so that the amount insured was to be apportioned between the two sets of underwriters; and, though some observations were made as to persons being entitled to insure for a lien, the case does not appear to us in any way to affect the main question in this case.

In *Wolff v. Horncastle* (3) the plaintiffs had, without orders in the first instance (though their act was adopted afterwards), effected the insurance for their correspondent Lund, for whom they were under advances, and for whom they were acting in respect of the shipment in question after it had been refused by the original consignee. They had also accepted for 300*l.* against the shipment. The declaration contained two counts, the first averring the interest

(1) 6 Taunt. 14.

(2) 1 Burr. 489.

(3) 1 B. & P. 316.

in Lund, and the second averring it in themselves. Objections were taken, as to the first count, that it could not be supported under the statute of 28 Geo. 3, c. 56, for want of a previous order to insure from Lund, the principal; and, as to the second count, that the plaintiffs had not an insurable interest, and that they made the insurance on account of Lund, and not of themselves. The Court supported the verdict for the plaintiffs on the first count for the full amount, upon the facts, on the ground of ratification by Lund; but they also held that the second count was supported; for, that the plaintiffs had a clear right to insure to the amount of 300*l.* for which they were interested in the goods. The Court considered that, upon the consignment being refused by the original consignee, the plaintiffs became the consignees for Lund; and Buller, J., said, in the course of his judgment (1), that “a debt which arises in consequence of the article insured, and which would have given a lien on it, does give an insurable interest;” and that “the case is not at all altered by the goods not having arrived.” The plaintiffs in that case recovered the full amount of the insurance; and it does not seem to us that, because the Court thought it *clear* that the plaintiffs had an insurable interest to the amount of their acceptances sufficient to support the second count against the only objection that was taken to it, and gave judgment for the plaintiffs for the whole amount insured, that therefore it is to be inferred that the Court thought the plaintiffs had no insurable interest beyond the amount of their acceptances; and more especially as that point was never raised upon the argument.

The subject appears to have been much considered in America; and in the year 1836 a case came before the Superior Court of New York, of *De Forest v. Fulton Insurance Company*. (2) In that case a commission-merchant had effected insurances against fire upon goods in his own warehouses, “as well the property of the assured as held by him in trust or on commission,” and a fire had destroyed goods belonging to his consignors as well as his own goods: and it was held that the plaintiff had an insurable interest in the goods held on commission for his consignors to their full value, and might recover the whole amount under an averment of

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(1) 1 B. & P. at p. 323.

(2) 1 Hall, 84.

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interest in himself, though he would be accountable as a trustee to his consignors for any sums beyond his own individual claims. Very elaborate judgments were delivered by the learned judges in that case, which are well worthy of perusal; and the general principles applicable to insurable interests as regards marine insurances, as well as terrene policies against fire, are fully and very ably discussed. Mr. Duer, in his *Law of Marine Insurance*, vol. 2. pp. 108, 109, refers to this case in the following terms: "It must, however, be admitted that it has been held by a Court of high authority that a consignee, as such, has in all cases an insurable interest co-extensive with the value of the property, and consequently that, when he has effected a policy in his own name, he is entitled to recover the entire loss that is claimed, on an averment in himself of a sole and exclusive interest; and this without any evidence of an authority express or implied, or of any previous advances, or of any subsequent adoption of the contract. It is true that this decision was made in relation to a policy against fire: but the reasoning of the judges was just as applicable to a marine insurance, and has been so considered by an eminent jurist (1), who seems to have given to their doctrine the sanction of his approval. I am, however, constrained to express the conviction that the decision thus interpreted is not sustained by prior authorities. My researches have not enabled me to discover a single case in the English reports in which a consignee, on an averment of a sole interest in himself, has been permitted to recover beyond the amount of his own advances; but, on the contrary, there are several decisions from which the opposite doctrine, viz. that in such a case his right to recover is limited to his own beneficial interest, seems a plain and necessary deduction."

At the date when this was published,—in 1846,—the English cases upon fire policies had not been decided. This decision of the Superior Court of New York is afterwards elaborately controverted by Mr. Duer in a long note at p. 161 of the same volume. With his views, however, we are entirely unable to concur. A great portion of his reasoning is founded upon the assumption which he makes at p. 167 with reference to *Lucena v. Craufurd* (2), that "it is not to be denied that the assured in this case

(1) Mr. Justice Story.

(2) 3 B. & P. 75. 2 B. & P. (N. R.) 269.

(that is, in *Lucena v. Craufurd*,) were consignees." It seems to us, however, that this assumption, and the argument of Mr. Duer which rests upon it, are not well founded. It is quite true that the Court of Queen's Bench in *Craufurd v. Hunter* (1), and the whole of the judges except Chambre, J., in the Exchequer Chamber, in *Lucena v. Craufurd* (2), and all the judges except Chambre, J., and Lawrence, J., in the same case in the House of Lords (3), considered that the commissioners were in the position of ordinary consignees of the Dutch vessels and goods, and as such entitled to insure them on their own account. But the two dissentient judges whose views ultimately prevailed, and the peers who decided the case in the House of Lords (though upon a point which applied to one only of the vessels), expressly repudiated that view of the position of the commissioners under the Act of Parliament, and considered that they had no right, interest, or power of interference or control in or over the property in any way until its actual arrival in this country; and that, if they were consignees in any sense, it could only be as mere agents, or, as it was termed, naked consignees, having no beneficial interest whatever in the property, and having merely a right to take possession of it and act as agents for the owners after its arrival in this country.

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We think, therefore, that it not only can be, but after the decision of the House of Lords must be, denied that the commissioners were consignees; and, if so, a great portion of Mr. Duer's argument as to the insurable interest of consignees, which is founded on this assumption, necessarily fails.

We also think that the other conclusions which Mr. Duer has drawn from those English cases which he cites, and which have been already noticed, are not warranted by those decisions, and that he has failed to establish that the decision of the Superior Court of New York in *De Forest v. Fulton Insurance Co.* (4), which proceeded in a great degree upon the doctrines of *Lucena v. Craufurd* (5), was not well founded. (6)

(1) 8 T. R. 13.

(2) 3 B. & P. at p. 93.

(3) 2 B. & P. (N. R.) 269.

(4) 1 Hall, 84.

(5) 2 N. R. 269.

(6) Mr. Duer says, vol. ii. p. 166, in a note, that the case of *Craufurd v. Lucena* in the Queen's Bench is not re-

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Mr. Justice Story, in his Law of Agency, § 111, refers to this subject, in the following terms:—"The question has often been discussed, whether factors or consignees for sale have an implied authority to insure for their principal; for, there cannot be a doubt that they may insure upon their own account to the extent of their own interest. The general doctrine now established is, that they may insure both for themselves and for their principal. But they are not positively bound to insure, unless they have received orders to insure, or promised to insure, or the usage of trade, or the habit of dealing between them and their principals, raises an implied obligation to insure. They may insure in their own names or in the name and for the benefit of their principal; and, *if they insure in their own name only, they may in case of loss recover the whole amount of the value of the property insured from the underwriters, and the surplus beyond their own interest will be a resulting trust for the benefit of their principals.* Whether, if they are mere naked consignees to take possession of the goods only, without a power to sell, they have a right to insure for themselves or for their principal, is perhaps more questionable; but the point has not as yet become the subject of direct adjudication." And in a note to this passage, after referring to the authorities, Mr. Justice Story says: "The whole subject underwent much examination in the case of *Lucena v. Craufurd* (1); but the most ample and satisfactory discussion of it is to be found in the very elaborate opinions delivered by Mr. Chief Justice Jones and Mr. Justice Oakley in the Superior Court of New York in *De Forest v. Fulton Insurance Co.*" (2)

The case of *De Forest v. Fulton Insurance Co.* (2) is cited by Mr. Phillips, 4th ed. p. 176, § 311, without dissent or comment, though in some other passages he seems rather to adopt the view that a consignee's insurable interest is limited to his own lien. In Parsons on Insurance, ed. 1868, at p. 50, it is said: "But, if the

ported. But it may be as well to mention that no fresh argument took place in that Court, as the same point had already been decided there in *Craufurd v. Hunter*, 8 T. R. 13, and by the bill of exceptions the case was taken at once

to the Exchequer Chamber without any argument or judgment in the Queen's Bench beyond the formal entry of judgment consequent upon the verdict.

(1) 3 B. & P. 75; 2 B. & P. (N.R.) 269.

(2) 1 Hall, 84, at pp. 100—136.

goods are insured by a consignee, or a warehouseman who describes them as goods in trust, he can recover not only to the extent of his lien for charges, commission, &c., but also to the full value of the goods, and the balance will be held in trust for the owner of the goods." And at p. 201, "A commission-merchant may insure for the full value of the goods consigned to him, and may recover not only what will indemnify him for the loss of his commissions, but the full value; so much of that value as is not needed to indemnify him being recovered by him for the benefit of the owners of the goods, provided he intends to insure for them, and the terms of the insurance are wide enough to cover their interest, and he has their previous authority to insure or their subsequent ratification of his act."

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Upon the whole, it appears to us that the weight of authority in America, as well as in this country, is against the views of Mr. Duer; and, with all respect for so learned a writer, we cannot subscribe to his opinions upon the subject.

We adhere to the law as stated by Mr. Arnould and by the Superior Court of New York, and by Mr. Justice Story and Mr. Parsons, which we consider to be in accordance with the decisions of the Courts and the opinions of the great majority of the judges in this country which have been already referred to. We believe it also to have been adopted in practice by merchants, agents, and underwriters, for a long series of years, without inconvenience or objection; and we are of opinion that the plaintiffs had an insurable interest to the full value of the cotton, and that the whole interest of all parties was covered by and recoverable by the plaintiffs in their own names under the policies in this case.

The effect of the plaintiffs' insuring and recovering in their own names would be to place them in the position of trustees for the other parties interested, as to any surplus beyond the amount of their own claim; and they, having received orders from Bell & Co. to insure, and having arranged with the National Bank of India to make their open policies available by declaring the whole value of the cotton under them, did by so doing constitute themselves, in our opinion, trustees for the other parties interested.

The plaintiffs effected these policies *in their own names*. It appears to us that, with the concurrence of the underwriters,

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EBSWORTH having then no persons as principals, and *to cover goods to be there-*
v. *after consigned by various persons to them*, and in every portion of
ALLIANCE which they would have an interest. The insurances were, we
MARINE think, intended *to cover the whole value of the goods* to be declared,
INSURANCE Co. and *the interests of the consignors* as well as of the plaintiffs them-
selves, and, when the declarations were made, *did in fact cover the*
interests of both. No other person except the plaintiffs could, in
our opinion, sue upon these policies; nor could it be correctly
alleged in the declaration that they were made on behalf of any
persons other than the plaintiffs themselves: and, under these
circumstances, and for the reasons before stated, we are of opinion
that the allegations in this declaration were supported by the
facts, and that the plaintiffs are entitled to recover the whole
amount of the insurances in their own names in this action.

I will now proceed to read the judgment of my Brother Brett,
who is unavoidably absent, being upon the Circuit.

BRETT, J. This action is brought on two policies of insurance.
By the first, dated the 23rd of November, 1869, Messrs. Irving,
Ebsworth, & Holmes, the plaintiffs, as well in their own name as
for and in the name or names of all and every person or persons
to whom the same doth, may, or shall appertain in part or in all,
did cause themselves and every of them to be assured to the
extent of 5000*l.* on cotton, lost or not lost, from Bombay to London
or Liverpool direct, or *viâ* Havre, in ship or ships, to follow policy
of the 4th of September, 1869. By the second, dated the 17th of
December, 1869, the plaintiffs in the same terms as before caused
themselves to be insured to the extent of 5000*l.* on cotton, lost or
not lost, from Bombay to London or Liverpool direct, or *viâ* Havre,
in ship or ships, to follow former policy.

On the 23rd of May, 1870, 846*l.* on the first policy was appropri-
ated to 250 bales of cotton per *Aurora*; and on the same 23rd of
May, 1870, 4154*l.* on the second policy was appropriated to the
same 250 bales of cotton per *Aurora*.

The declaration stated the interest in the cotton as follows:—
that the plaintiffs or some or one of them were or was interested

in the said goods to the amount of all the moneys by them insured thereon, and the said insurance was made for the use and benefit and on account of the person or persons so interested.

There were pleas traversing the allegations that the plaintiffs caused themselves to be insured as alleged, and that the goods or any part were shipped as alleged, and a plea alleging that the plaintiffs were not nor were any nor was either of them interested in the said goods, nor was the said insurance made for the benefit of the persons or person so interested as in the said counts alleged.

It was proved at the trial before Keating, J., at Guildhall, that Messrs. Bell & Co., of Bombay, were correspondents of the plaintiffs, who were merchants in London, and that, on the 28th of October, 1869, the plaintiffs in London wrote and sent to Bell & Co. in Bombay a letter of credit, in the following terms:—

“Our previous letters of credit for advances on cotton to our consignment having expired, we beg leave to renew the same as follows:—You are by the present authorized to value on us at usance at the rate of 10*l.* sterling per bale of cotton, cost f. o. b. and freight, against shipping documents and timely insurance orders or policies of insurance; and we engage to accept the drafts so drawn on presentation, and to pay the same at maturity, &c. The shipments not to exceed 200 bales cotton by any one vessel, and the present credit to be limited to 30th April next, unless previously withdrawn.”

On the 23rd of November, 1869, the plaintiffs effected with the defendants the first, and on the 17th of December, 1869, the second floating policy sued on. The plaintiffs on the 23rd of November, 1869, declared on the first policy cotton per *Ann Milicent*, and on the 13th of September, 1869, other cotton per *Clutha*, and so on.

It is to be taken that, in April, 1870, Bell & Co. and Curson das Madhowdass, of Bombay, agreed to consign cotton to Liverpool on joint account, and that 250 bales were shipped by Bell & Co. on such joint account on board the *Aurora*. The bill of lading, dated the 28th of April, 1870, was as follows:—“Shipped, &c., by Robert Bell & Co., of Bombay, &c., 250 bales of cotton, &c., to be delivered, &c., unto order or to their assigns, he or they paying freight as per margin,” &c.

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On the same 28th of April, 1870, Bell & Co. drew on the plaintiffs a bill of exchange in the following form:—"Bombay, 28th April, 1870. Six months after sight, &c., pay to the order of ourselves the sum of 3000*l.* sterling, value received, which place to account of shipment of 250 bales cotton per *Aurora*." This bill was indorsed in blank by Bell & Co., and then specially to the National Bank of India or order by Cursondas Madhowdass. Bell & Co. on the same day entered into a transaction with the National Bank of India, in Bombay, which is described in the following letter written and handed by them to the bank:—[See this letter set out, ante, p. 602.]

On the 29th of April, 1870, Bell & Co. wrote direct to the plaintiffs,—“We have the pleasure to inform you that *we have induced Cursondas Madhowdass, of Bombay, to ship on joint account with ourselves 250 bales cotton per Aurora*, and against this shipment we have valued upon your good selves by this opportunity, through the National Bank of India, for 3000*l.* at six months, to which we crave your kind protection. Sample of this shipment we forward overland to your address by this mail. We hope this cotton will arrive with you at a favourable opportunity, and, confiding the same to your care and attention, we are,” &c.

On the 29th of April, 1870, Cursondas Madhowdass wrote to the plaintiffs, and sent their letter open to the bank:—"I beg to advise you that I have shipped to your care through Messrs. Bell & Co., of this place, the under-mentioned cotton, and I inclose invoice thereof. Against the same I have drawn upon you as at foot, with the indorsement of the above-mentioned firm; and I beg your kind attention to my draft. I should also feel obliged by your effecting insurance, and on arrival of the shipment please sell it to best advantage, remitting to me any balance, &c. Should, however, the net proceeds fall short of the amount of your acceptance, together with any charges, &c., I hereby authorize you to draw upon me," &c.

The bill of exchange or draft before mentioned for 3000*l.*, indorsed by Bell & Co., and Cursondas Madhowdass, being discounted by the National Bank of India, was forwarded by them to their agents in England, together with the bill of lading and shipping documents. The draft was presented to and accepted by

the plaintiffs on the 21st of May, 1870, in the following form,—
 “Accepted 21st May, 1870, against delivery of shipping documents
 for 250 bales cotton per *Aurora*.”

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On the 23rd of May, the plaintiffs declared on the open policy of the 23rd of November, 1869, 846*l*. on 250 bales cotton per *Aurora*, valued at 5000*l*., and on the same day, on the open policy of the 17th of December, 1869, 4154*l*., to make up 5000*l*., on the same 250 bales per *Aurora*, valued at 5000*l*. On the 27th of May, 1870, the plaintiffs wrote to the National Bank of India, in London, as follows:—

“We beg to inform you that we have declared on our open marine policies for 5000*l*. dated 23rd November, 1869, and 5000*l*. dated 17th December, 1869, effected with the Alliance Insurance Company (the defendants), the following shipments from Bombay to Liverpool; and we hereby undertake and guarantee to hold the amount insured at your disposal until payment of our acceptance for 3000*l*., due 24th November.

“Particulars,—250 bales cotton per *Aurora*: amount declared, 5000*l*.”

The ship and cargo were lost by the fraudulent scuttling of the ship on the 17th of June, 1870. The plaintiffs met their acceptance when due, i.e. on the 24th of November, 1870, and then received from the National Bank of India the bill of lading indorsed and the shipping documents.

The plaintiffs gave evidence at the trial, as follows,—“The insurance was effected for Bell & Co. and ourselves.” A verdict was found for the plaintiffs for 5000*l*., with leave to reduce the amount to 3000*l*. Sir John Karlake obtained a rule calling upon the plaintiffs to shew cause why the verdict should not be entered for the defendants on the third plea, on the ground that the plaintiffs had not proved that which was therein traversed, or to reduce the damages.

Before entering on an examination of the different propositions of law which have been discussed, as applicable to the relative positions of the plaintiffs, the defendants, and the other parties mentioned in the case, it is necessary to determine accurately what that relation was.

The first transaction in evidence is, the letter of credit from the

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plaintiffs to Bell & Co., dated the 28th of October, 1869, authorizing Bell & Co., within certain limits and on certain conditions, to draw on the plaintiffs.

The next transactions,—and which were before any act done by Bell & Co. having reference to the plaintiffs,—were, the taking out by the plaintiffs of the floating policies now sued upon, and the declarations on them of cargoes shipped on consignment to the plaintiffs by other correspondents than Bell & Co. or Cursonadas Madhowdass. These policies were therefore clearly not taken out solely to cover any goods which might be consigned by Bell & Co. They were taken out before there was any binding contract between the plaintiffs and Bell & Co. as to future shipments. They were taken out when the name of Cursonadas Madhowdass was unknown in business to the plaintiffs. They were taken out with a view to cover either any interest which the plaintiffs might afterwards have in consignments from any correspondents of theirs, or such interests and also the interests of any as yet unascertained correspondents who might consign to them. The shipment of the cotton on board the *Aurora* is to be taken to have been made on the 28th of April, 1870. It was not within the terms of the letter of credit; it exceeded the limits, and was not according to the conditions; it was not on behalf of Bell & Co. only, but on behalf of Bell & Co. and Cursonadas Madhowdass jointly. It was a shipment which the plaintiffs were not bound to recognize. Until they did recognize it they had no interest in it. Bell & Co., however, drew in respect of it on the plaintiffs.

The next transaction was between Bell & Co. and Cursonadas Madhowdass on the one part, and the National Bank of India on the other, which took place also on the 28th of April, 1870. The bank discounted the draft for 3000*l.* drawn by Bell & Co. on the plaintiffs, and took as security an indorsement of the bill of lading of the cotton, with a power of sale if the draft should not be accepted and paid. Such an indorsement passed the legal property in the cotton to the bank, subject to a trust in favour of Bell & Co. and Cursonadas Madhowdass jointly. Bell & Co. and Cursonadas Madhowdass then both addressed the plaintiffs, requesting them to accept and honor the draft and insure the cotton, and authorizing the plaintiffs, on payment of their acceptance, to obtain the

bill of lading and to sell the cotton, in order, first, to reimburse the plaintiffs' advance, and then, subject to commission, to hold and pay over the surplus for and to Bell & Co. and Cursondas Madhowdass jointly. On the 21st of May, 1870, the plaintiffs accepted the draft for 3000*l.*, and thereby recognized the shipment and accepted the terms proposed to them. Then for the first time was established a relation of the plaintiffs to the cotton in question. Then arose a contract between them on the one part and Bell & Co. and Cursondas Madhowdass on the other, by which they undertook to pay their acceptance and to receive and sell the cotton, and to hold and pay over any surplus proceeds, and by which they acquired a right to have the bill of lading eventually indorsed to them, and to have the cotton placed in their hands for sale to cover their advances. This contract and position of affairs did not pass the legal property in the cotton to the plaintiffs, for that was still in the National Bank of India. It did not give a present right of possession of the bill of lading, or even a right of possession of the cotton on arrival. It gave a present interest in the cotton to the plaintiffs, that is to say, a right by an existing contract to have the bill of lading indorsed to them on the payment of their acceptance, so as to enable them to sell the cotton to pay themselves 3000*l.* and their expenses, and to earn their commission, and to hold the surplus proceeds as agents for Bell & Co. and Cursondas Madhowdass. The right in equity would, I apprehend be, to have a decree for a specific performance of such contract. But, until the acceptance should be met, I should apprehend that the plaintiffs could not be held to be either legal or equitable owners of the cotton. Nor were the plaintiffs trustees for Bell & Co. of the cotton.

Speaking of the relation of the Dutch commissioners to the ships of which they would have had the disposal if they should have arrived, Lord Eldon says in *Lucena v. Craufurd* (1): "With respect to the case of a trustee, I can see nothing in this case which resembles it. A trustee has a legal interest in the thing, and may," he adds, "therefore insure."

It was after entering into this relation with Bell & Co. and Cursondas Madhowdass, and having acquired this interest in the cotton,

(1) 2 B. & P. (N. R.), at p. 324.

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that the plaintiffs, on the 23rd of May, 1870, declared 5000*l.* in respect of the cotton on the policies. And, whatever may have been the terms used by the witnesses in giving evidence, it must be, I think, with regard to the declarations then made that it was stated "that the plaintiffs insured for Bell & Co. and themselves." In reality they intended then to declare for and so to insure their own interest to 3000*l.*, and the interest of their correspondents in the anticipated or valued surplus of 2000*l.*

It was whilst the transactions thus stood that the ship was lost. The plaintiffs then had the interest above described: they were not legal owners, nor equitable owners, nor trustees, but contractors having by contract certain rights to deal with the cotton in a certain way, on the happening at a future time of a certain contingency.

Afterwards, on the 24th of November, 1870, the plaintiffs paid their acceptance of 3000*l.*, and received the bill of lading, indorsed by the bank. But the cotton was already lost, and no property therefore passed by such indorsement.

Upon these facts it was contended on behalf of the plaintiffs that they had the whole legal interest in the goods when they accepted the draft; and that all their obligation to Bell & Co. from that time was, to account as trustees for the surplus proceeds of sale; and, if not, that still they had an interest in every part of the goods which gave them an insurable interest in the whole, so that they might insure the whole to their full value in their own name, holding the surplus (if any) above their own actual or beneficial interest as trustees for Bell & Co. and Cursonadas Madhowdass, one or both.

It was contended on behalf of the defendants, that the plaintiffs had no insurable interest at all; that they had only an expectancy of profit resting on a contingency; that, if they had an insurable interest, it was to the extent only of their own beneficial interest, viz. 3000*l.*; that they could not insure in their own names and on their own behalf more than such interest; that the only persons who, without having a beneficial interest equal to the whole value, can insure in their own names to the full value, holding a surplus as trustees, are those who are in law owners and in equity trustees of the property insured, and that the plaintiffs were not such legal owners, and consequently not such trustees.

It was further argued that, if in consideration of law the plaintiffs could be said to have insured for themselves and Bell & Co., they failed on the pleadings, because they had invited and accepted an issue that they alone were interested and they alone had insured.

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In answer to this last objection, it was urged on behalf of the plaintiffs, that the plea was severable; that, as to the allegation that the insurance was made on their behalf alone, it was true; and that there was no allegation that they alone were interested, but that the allegation amounted only to an assertion that they had an interest, which was true.

The first point thus raised is, whether the plaintiffs had any insurable interest. I think they had; because they had an existing contract with regard to the cotton, by virtue of which they had an expectancy of benefit and advantage arising out of or depending on the safe arrival of the cotton.

The next question is, what was the amount of the plaintiffs' insurable interest. If they had any, it would seem to be at least to the extent of 3000*l.*, their advance, and their expenses and expected commission.

The main question is, whether they could insure for more than that in their own name, and recover for more on a declaration alleging the interest to be in themselves. Their relation to the cotton was described in argument, and I think fairly described, to be that of consignees for sale of goods not yet arrived, who have made advances on the goods, but have only a contract right with regard to the goods, without being legal owners of them. They have the interest described in every part of the goods, but are not legal owners of any part. The ruling principle of insurance, which is that it should afford only an indemnity to any assured for his loss, would seem to limit the right of the plaintiffs under such circumstances to the recovery of their own beneficial interest only. If in an action at law the assured can recover on the contract of insurance more than his own beneficial interest, he recovers according to law more than an indemnity. It would seem to be no answer in a Court of law to say that he holds a surplus of what he has recovered as trustee for some one else. The law has no means of enforcing the payment over by him, on the mere

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ground of his being a trustee. This view, it is true, should prevent a legal owner, but trustee, of the property insured from being able to insure and recover in his own name: yet it seems to be stated on high authority that a legal owner, being trustee, may insure and recover in his own name, holding the proceeds in trust for his cestui que trust. This must be on the ground that the law will not dispute the legal interest which is the legal result of the legal ownership; though in insurance contracts it will also recognise an equitable interest as entitling the owner of it to enter into or take advantage of the legal contract of insurance.

In *Lucena v. Craufurd*, Lawrence, J., says (1): "The defendants in error have been considered as trustees or consignees, who, it is said, have insurable interest. A trustee who has an insurable interest must, as I conceive, have some existing right to the thing insured, for the benefit of another." Having regard to what follows, and to the statement of Lord Eldon in the same case, the phrase "existing right," as here used, means an existing *legal* right. "But," continues the learned judge, "the commissioners in this case had not any such right, and therefore cannot, according to my notions of a trustee, be considered as such. Nor can they be considered as consignees in whom any interest or right is vested by bill of lading or other instrument of consignment *by which the property of the subject-matter of the consignment primâ facie will pass*. If they be consignees, they were naked consignees for the purpose of doing some act respecting the goods consigned, and rather agents than consignees according to the common understanding of that word; and, taking them to be naked consignees *who have not the legal property of the subject-matter of the insurance*, and who are not beneficially interested in it, they ought, I conceive, to have averred the interest to be in those on whose account the insurance was made."

The real effect of the decision of the House of Lords in this case is well discussed by Duer, Vol. 2, p. 161 et seq., in n. (2) to § 10. "The proposition to be discussed," he says, "and for the maintenance of which this case has been cited, is, that a consignee clothed with the power of sale has in all cases an insurable interest to the full value of the goods consigned to him, and may cover them on

(1) 2 B. & P. (N. R.) at p. 306.

the voyage of importation by a policy effected in his own name and on his own account. The truth of this proposition, and the justness of its deduction from the authorities relied on, are the questions I propose to examine: but I shall first endeavour to shew that the opposite doctrine, viz. that the right of a consignee to recover on an averment of interest in himself *is limited to his own advances*, constituting a lien on the goods insured (which necessarily implies that he has no insurable interest beyond those advances), is established, not by ambiguous dicta, but by positive decisions." The learned author then minutely, and I think accurately, discusses the case of *Lucena v. Craufurd* (1), and sums up thus: "The result is that the final decision in *Lucena v. Craufurd* seems definitively to have settled the law, that a consignee, where he means to cover, not a beneficial interest of his own, but the entire property of the consignor, must so frame the policy as by its terms to embrace that interest; and, *to enable him to recover a loss, must aver that interest in the declaration*, and on the trial, not only prove its existence, but his own authority to make the insurance, or the adoption of his contract."

In *Wolff v. Horneastle* (2), the plaintiff, who was held by the Court to have become before the loss the consignee of the goods, and to have advanced 300*l.* on the security of the goods, was further held to be entitled to recover on the second count in the declaration, in which he averred the interest to be in himself. But Buller, J., says expressly,—“I hold that the plaintiffs had a clear right to insure *to the amount of 300*l.* for which they were interested in the goods.*”

In *Carruthers v. Sheddon* (3), the plaintiffs were held entitled to recover the full value of the cargo, upon a count alleging the interest to be in Dowrick & Way. The cargo was shipped under an agreement by which it was stated that Dowrick & Way and two others had agreed to become partners in an adventure of sending goods which Dowrick & Way had on their own separate and personal credit actually and really purchased, &c. The jury found for the plaintiffs, and that the policy was intended to cover all the partners in the adventure. The objection taken in argument

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(1) 3 B. & P. 75; 2 B. & P. (N.R.) 269.

(2) 1 B. & P. 316.

(3) 6 Taunt. 14.

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was, not that the interest ought to have been declared to be in all, but that Dowrick & Way could not insure more than their own interest as partners. The Court did not hold that Dowrick & Way might insure to the whole value merely on the ground of their being consignees; if that ground had been sufficient, the whole argument was futile: the Court held, in terms, "that Dowrick & Way might protect *all their species of interest* under one policy." Duer, Vol. 2, p. 162, holds that "the sole ground of the decision was that the advances which they had made as consignees, added to their individual interest as partners, were equivalent to the entire value of the property insured." It does not appear in the case whether Dowrick & Co. were indorsees and holders of the bill of lading. It may be inferred from the nature of the transaction and their position that they were; and, if so, they were legal owners as well as consignees. Speaking of this case, and of *Wolff v. Horncastle* (1), Mr. Phillips, Vol. 1, § 423, says: "So, a consignee or other party entitled to a lien upon property on account of advances or otherwise, may cover *his own interest* by insurance on it in his own name generally."

In *Godin v. London Assurance Co.* (2) it was held that the English factor, to whom the bill of lading was not indorsed, might insure to the full value of the goods; but on the ground that his advances were to the extent of the full value and more. "Such factor," says Arnould, Vol. 1, p. 247, abstracting this case, "had an insurable interest *to the extent of his general balance*, and might recover, averring the interest to be in himself."

In *Robertson v. Hamilton* (3), it is difficult to extricate the exact grounds of the decision. The interest was in two counts alleged to be in the plaintiffs; in the third count, in Fisher, Kidd, & Co., the registered owners of the ship. The plaintiffs were consignees of the ship, and had made advances the amount of which is not disclosed in the case. It was held that the plaintiffs might recover the full value of the ship "as trustees," it is said, "for those interested with themselves in the whole." If the plaintiffs were entitled to recover as agents for Fisher, Kidd, & Co., they recovered as for the legal registered owners. If they recovered on the counts

(1) 1 B. & P. 316.

(2) 1 Burr. 489.

(3) 14 East, 522.

alleging their own interest, it may be that their advances, *primâ facie*, and until the accounts were settled in equity, were equal to the whole value. Lord Ellenborough says: "The plaintiffs had an insurable interest as upon a hotchpot right." That I confess I do not understand.

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In *Irving v. Richardson* (1), the question was whether the assured had insured in fact, that is to say, had intended to insure, more than his own interest as mortgagee. If he intended to insure only that, he could keep only as much as his interest amounted to. If he had intended to insure both his own interest and that of the mortgagor, I collect from the judgment of Littledale, J., that, in an action on the policy, he must under the new Registry Acts have alleged interest both in himself and the mortgagor. "Before the late Registry Act," he says, "the mortgagee of a ship was in point of law the owner, and might insure to the full extent of the ship's value to the mortgagor as well as to himself. But by the statute the interests of mortgagor and mortgagee are more distinctly severed than they formerly were." That says, in effect, that, when the mortgagee was legal owner, he could insure to the full value of the ship, though not beneficially interested to that extent; but now he was not legal owner, and could therefore insure and recover in his own name only to the extent of his beneficial interest.

In *Sutherland v. Pratt* (2), it is obvious that the bill of lading, indorsed generally to bearer, was delivered to the plaintiff, so that he was the legal owner of the goods. In *Crowley v. Cohen* (3), the plaintiffs, who were carriers and not the legal owners, were allowed to insure and recover the full value in their own name: but it was on the ground that they were carriers, and were themselves liable for the full value. Speaking of this case, it is said in 1 Phillips on Insurance, § 424, p. 234,—“This is in effect a re-insurance, as the carriers may be considered to be insurers.”

In 1 Arnould on Insurance, 4th ed. p. 70, the cases of factors, consignees, and agents are treated of: "There are different sorts of consignees; some have a power to sell, manage, and dispose of the property, &c.; others have a mere naked right to take possession; others, again, though not intrusted to sell, are yet in-

(1) 2 B. & Ad. 193.

(2) 11 M. & W. 296; 12 M. & W. 17.

(3) 3 B. & Ad. 478.

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terested in the property, as having a lien or claim upon it for their advances." As to mere naked consignees, i.e. those only entitled to take possession, they have, he says, no insurable interest: "they have no legal property; they are not beneficially interested." But, "with regard to consignees who have a lien or claim on the property in respect of advances, or commission-agents to whom it is intrusted for the purpose of sale, or indorsees of the bill of lading to whom a general balance is due, there is no doubt they may effect an insurance on the property in their own names and on their own account to its whole value, and recover thereon, averring interest in themselves, at all events to the amount of their lien, claim, or balance." It is true that he afterwards says: "As a general principle, there can be no doubt that consignees of goods, being in advance to the consignors or under acceptances for them, may insure in their own name and on their own account to the full value of the goods, and apply the proceeds of the policies to their own benefit, up to the extent of their claims in respect of such advances and acceptances, *holding the residue in trust for the consignors.*" For this proposition he quotes *Carruthers v. Sheddon* (1), with which I have already dealt, and the American case of *De Forest v. Fulton Insurance Co.* (2) The terms of the policy, which was a fire policy, are set out in 1 Phillips on Insurance, § 311, p. 177, and they were "on goods *as well the property of the assured as held by them in trust or on commission.*" It seems to me that this is no authority for Mr. Arnould's proposition as to consignees of goods on board ship who insure by a marine policy in the ordinary terms. And for the same reason the English cases on fire policies are no authority. The proposition may be correct, if it be applied to consignees under advance or acceptance, *who are holders of bills of lading*, and thereby legal owners of the goods mentioned therein.

In 1 Phillips on Insurance, c. 3, sect. 7, § 309, p. 174, the law is thus stated:—"A consignee, factor, or agent, having a lien on goods to the amount of his advances, acceptances, and liabilities, stands in this respect (i.e. as to his insurable interest) precisely in the situation of a mortgagee. A debt is due to him from his principal for which he holds the property as collateral security, and the

(1) 6 Taunt. 14.

(2) 1 Hall, 84.

property is at the risk of the principal, as the debt would still subsist though the property should be lost; and the excess over the proceeds of the goods would be still due to him in case of the proceeds being insufficient to satisfy his claim. *He has, therefore, an insurable interest in the goods to the amount of his lien.*" And in § 204,—“It is a familiar doctrine that a party having a lien on a vessel or cargo under a contract for advances may be rightly considered as the special owner of them *to the extent of those advances*, and, as such, may protect himself by insurance; and that a creditor to whom goods are assigned as collateral security, has an insurable interest in them *not exceeding the amount of his debt.*”

To the elaborate note of Duer, n. (2), on sect. 10, I have already referred. In Vol. 2, p. 109, he says: “My researches have not enabled me to discover a single case in the English reports in which a consignee, on an averment of a sole interest in himself, has been permitted to recover *beyond the amount of his own advances.*”

It seems to me to follow from these authorities, and from principle, that a consignee, as such, has no insurable interest at all. “To assert the universal right of a consignee to insure the entire property on the voyage of importation, is to assert that a valid insurance may be made by a person who has no title or interest, legal or equitable, and no authority express or implied:” 2 Duer, p. 111. If it is necessary to bring in some advance, or some contract giving an interest, in order to give the consignee a right to insure, it seems to me to follow necessarily, i. e. logically, that the insurable interest is limited to the amount of the advance, or to the amount of the interest under the contract. It cannot be that a consignee without personal interest cannot insure at all, and that a consignee in advance to the extent of 100*l.* can insure to 10,000*l.*, and recover such an amount upon an averment that it is the interest he has. He has no such interest.

It seems to me, therefore, both upon principle and authority, that the plaintiffs in this case, being only consignees to sell, under advance, and with a contract right to earn commission, but not being the legal owners of the cotton, could only properly insure, so as to recover in their own name, the 3000*l.* for which they were liable on their acceptance and any commission they would have earned by selling.

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It was urged that, if that be the law, the plaintiffs could not recover at all, because they intended to insure, not only their own interest, but also the interest of their correspondents. But Duer, Vol. 2, p. 45, points out that, in *Wolff v. Horncastle* (1), "the judgment of the Court is an express decision that, where a policy is effected on behalf of the consignor, the consignee is at liberty to apply it to his own use to the extent of his own insurable interest, and that his claim is not answered by shewing that, when he effected the insurance, he expected that it was to apply exclusively to the interest of the consignor." Moreover, it may be doubted whether the policy in this case could cover an interest of Bell & Co. or Curson das Madhowdass. At the time it was effected, the plaintiffs had no authority, express or implied, to insure on their behalf. It may be, though I think it unnecessary to determine the point, that *Watson v. Swann* (2) is an authority for saying that a policy cannot cover the interests of persons who at the time of effecting it are wholly unconnected with and unknown to the person effecting the insurance. If the policy did not and could not cover the interest of Bell & Co. or Curson das Madhowdass the declaration on the policy, though made with intent to cover those interests, has no effect: *Stephens v. Australasian Insurance Co.* (3)

As I have come to the conclusion that the plaintiffs can recover to the extent of their own interest, and to that extent only, it seems to me unnecessary to determine the controverted question arising upon the third plea by way of traverse. I doubt whether the distinction affirmed by Mr. Duer between the allegation of interest and the allegation with respect to the party for whom the contract of insurance was made, is sound. It may be true to say that *Bell v. Ansley* (4) and *Cohen v. Hannam* (5) do not necessarily overrule *Page v. Fry*. (6) But most certainly, in *Cohen v. Hannam* (5), Lord Mansfield intended to overrule it; and the reasons in favour of confining the allegation of interest are, as it seems to me, precisely the same as the reasons for confining the allegation as to the person on whose account the policy was made. It is equally objectionable to have a person interested on the jury, as

(1) 1 B. & P. 316.

(4) 16 East, 141.

(2) 11 C. B. (N.S.) 756; 31 L. J.

(5) 5 Taunt. 101.

(C.P.) 210.

(6) 2 B. & P. 240.

(3) Ante, p. 18.

to have a person who is a party to the contract. It is equally just that the defendant should have the opportunity of interrogating a party interested as a party to the action. The present case is a remarkable instance. It was of the utmost importance to the defendants, if their suspicions were well founded, to have the opportunity of interrogating Bell and Curson das Madhowdass.

I am of opinion that the rule should be made absolute to reduce the damages.

BOVILL, C.J. My Brother Keating, who is also absent upon the Circuit, concurs in the judgment of my Brother Brett which I have just read.

The Court being equally divided in opinion, the rule to enter the verdict for the defendants or to reduce the damages will be discharged, and the defendants will be at liberty to appeal to a Court of Error.

Rule discharged. (1)

Attorneys for plaintiffs: *Parker & Clarke.*

Attorneys for defendants: *Walton, Bubb, & Walton.*

LORD BOLINGBROKE *v.* TOWNSEND, CLERK TO THE LOCAL BOARD OF HEALTH OF SWINDON. May 30.

Practice—Amendment—Misdescription of Defendant.

An action having been brought against *the clerk* of a local board of health, the Court allowed the writ and subsequent proceedings to be amended by substituting the board as defendants instead of the clerk.

On the 21st of February, 1873, a writ of summons at the suit of Lord Bolingbroke was issued against J. C. Townsend, clerk to the Local Board of Health of Swindon New Town. On the 9th of May a summons was taken out, calling upon the defendant to shew cause why the plaintiff should not be at liberty to amend the writ and subsequent proceedings (if any) by substituting the local board as defendants instead of Townsend as their clerk. Master Kay] dismissed the summons; but, on appeal, Blackburn, J.,

(1) The defendants to be at liberty to appeal.

8 Q.B. 499

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made the order, under s. 222 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76).

Collins moved to rescind that order, upon an affidavit which stated that the alleged injury for which the action was brought was committed more than six months ago, viz. in August, 1872. He referred to *Clay v. Oxford* (1) and *Pryor v. West Ham Board of Works*. (2) In the former it was held that, where an action is commenced in the name of a dead man, his representatives cannot be substituted as plaintiffs; Bramwell, B., saying: "The power of amendment is limited to cases where there was originally a party suing, possessed, though with a variety in legal description, of the same interest with the party to be substituted,"—which cannot be said in this case. And in the latter *Montague Smith, J.*, refused at nisi prius to amend the record by substituting the name of the clerk for the original plaintiffs, they not being a corporate body.

[*BOVILL, C.J.*, referred to *Galloway v. Bleaden* (3), where a similar amendment was allowed (upon terms) after trial and after a motion in arrest of judgment.

GROVE, J., referred to *La Banca Nazionale Sede di Torino v. Hamburger*. (4) There, a foreign bank sued in a corporate name by which it was known, and the defendant pleaded that it was not a body corporate: the Court allowed the writ, declaration, and subsequent proceedings to be amended by inserting the name of a director of the bank as nominal plaintiff,—it appearing that by the law of Italy the bank was entitled to sue in his name. In the course of the argument, *Pollock, C.B.*, said: "Some corporations are entitled to sue in their corporate names, others in the name of a particular officer. Now, suppose a corporation sued in its corporate name, when it ought to have sued in the name of an officer, why should not the writ be amended? It is not adding a new plaintiff, but correcting a mere mistake in the name.]

BOVILL, C.J. There can be no doubt as to the power of the Court to allow this amendment, quite independently of the Common Law Procedure Act. That which has been allowed by

(1) Law Rep. 2 Ex. 54. *12 Jan 1874* (3) 1 M. & G. 247.

(2) 15 L. T. (N. S.) 250. (4) 2 H. & C. 330.

my Brother Blackburn is a mere amendment of a misdescription of the real defendant. *Galloway v. Bleaden* (1) is substantially an authority for that; and the case referred to by my Brother Grove is a distinct authority, and is all fours with the present case. The object here is, not to substitute one defendant for another; but merely to alter the description of the defendant upon the record, to prevent justice from being defeated. I think my Brother Blackburn's order was quite right.

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KEATING, BRETT, and GROVE, JJ., concurred.

Rule refused. (2)

Attorney for defendants: *W. Moon.*

EDGSON v. CARDWELL.

May 24.

New Trial—Damages under 20l.—Replevin.

The rule that a new trial will not be granted for either party, where the sum given or recoverable is under 20l., does not apply to replevin.

REPLEVIN. The cause was tried before Cleasby, B., at the Nottingham Summer Assizes, 1872, when a verdict was found for the plaintiff, damages 10l. In the following Michaelmas Term, a rule nisi was obtained for a new trial, on the ground that the verdict was against the weight of evidence.

Cave and *T. T. Weightman* shewed cause. Replevin forms no exception to the general rule that a new trial cannot be had as for a verdict against evidence when the sum recovered or sought to be recovered is under 20l.: *Brown v. Ray*. (3) In that case Best, C.J., says: "If we were to grant a new trial, it is quite clear that it must be on the terms of payment of costs by the defendant; and he might eventually be put to the expense of 50l. to get rid of the trifling sum of four guineas for which the plaintiff has obtained a verdict. Although the rule that the Court will not grant a new trial on account of trifling damages may not

(1) 1 M. & G. 247.

(2) See *Mills v. Scott*, Law Rep. 8 Q.B. 496.

(3) 9 B. Moore, 583.

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extend to an action of replevin, still it appears to me to be so far salutary as not to be entrenched on in the present instance." And in *Parry v. Duncan* (1), Tindal, C.J., says: "We should pause in discharging this rule, if the consequence of our discharging it were to deprive the defendant of all remedy for his rent. But he may still recover that, if it be due, in an action for use and occupation; while, on the other hand, if we were to make the rule absolute, the plaintiff might by the result of another trial be called on to pay double costs, and his sureties be rendered subject to a liability from which they are now exempt. Under such circumstances, we ought not to set aside the verdict, unless there are clear grounds for doing so."

A. Wills, Q.C., and *J. C. Lawrence*, for the defendant.

BOVILL, C.J. *Brown v. Ray* (2) is not a very satisfactory decision; and the point hardly arose in *Parry v. Duncan* (1); for, Tindal, C.J., goes on to say,—“I have some doubt whether the issue which has been found for the plaintiff was correctly found by the jury; but, before the defendant can ultimately succeed, he must establish the second issue, viz. that the goods were fraudulently removed; and upon the evidence which has been offered there is nothing to make that out, nothing to shew that the goods were removed with the view to elude a distress, or that no goods remained on the premises demised. It seems to me that, under these circumstances, no sufficient ground has been shewn for sending the cause down again.” The rule as laid down in Lush’s Practice, 3rd ed. p. 636, is as follows:—“A rule nisi for a new trial,” on the ground that the verdict is contrary to the weight of evidence, “will not be granted for either party, when the sum given or recoverable is under 20*l.* and the action is for damages only, and does not involve any other question of right.” Replevin is not within the rule.

The rest of the Court concurred, Keating, J., observing, “The rent might be 1000*l.* a year.”

Upon the reading of the learned Baron’s report, it appearing

(1) 7 Bing. 243, at p. 245.

(2) 9 J. B. Moore, 583.

that there was evidence on both sides, and that his Lordship was not dissatisfied with the verdict, the rule was ultimately discharged.

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Rule discharged.

Attorneys for plaintiff: *Parker, Lee, & Haddock, for Parsons & Bright, Nottingham.*

Attorneys for defendant: *Duncan & Murton, for Watson & Wadsworth, Nottingham.*

RODOCANACHI AND OTHERS v. ELLIOTT.

June 2.

Marine Insurance—Description of Voyage—Overland Transit—Hostile Detention of Goods in a besieged Town a “Restraint of Princes”—Abandonment—Total Loss.

A marine policy may cover the risks during a portion of the transit to be performed overland, provided apt language be employed to express that intention.

The hostile detention of goods within a besieged city or town is a “restraint of princes;” a “siege” and a “blockade” standing upon the same footing in this respect.

In a policy of insurance the course of the voyage was thus described:—“At and from Japan and [or] Shanghai to Marseilles and [or] Leghorn and [or] London via Marseilles and [or] Southampton, and whilst remaining there for transit, with leave to call at any ports or places in or out of the way for all purposes, including all risks of craft to and from the steamers, &c., upon any kind of goods, &c., in the good ship or vessel called the — steamers or steamer, per overland, or via Suez Canal,” &c. The risks insured against were, amongst others, “of the seas, men of war, enemies, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people,” &c. In the margin of the policy was the following memorandum,—“It is hereby agreed that the silks insured by this policy shall be shipped by Peninsular and Oriental Company, Messageries Impériales steamers, and [or] the steamers of the Mercantile Trading Company of Liverpool only.”

The goods insured (silks) were carried from Shanghai to Hong Kong in a steamer belonging to the Messageries Impériales, and were there transhipped into another steamer of the same company and carried through the Suez Canal to Marseilles,—this being the ordinary course of business of that company in carrying goods from Shanghai to Marseilles. Goods are carried by the Messageries Impériales at through rates from Shanghai to London; and the freight upon the silks in question was paid to that company for the whole journey.

At the time of effecting the policy, the steamers of the Messageries Impériales ran from the East to Marseilles and no further. Goods were never, in the ordinary course of business, carried from China, Japan, or India to London via Marseilles except by the Messageries Impériales, and that company always sent such goods overland through France,—by the Lyons railway from Marseilles to Paris,

10 QBD 4

1873 — and thence by the Northern railway to Boulogne, and thence to London: and this course of business was well known among underwriters.

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The silks in question, having reached Marseilles, were forwarded by the Lyons railway to Paris on the 3rd of September, 1870, and arrived at the Paris station on the 13th. At this time the German armies had invaded and occupied a large part of France, and were advancing upon Paris, which they had completely surrounded and besieged by the 19th, preventing all communication between Paris and all other places, so that it was impossible to remove the silks from Paris. This state of things continued until (and long after) the 7th of October, on which last-mentioned day the assured gave notice of abandonment. After the commencement of this action the silks were forwarded to London; and they arrived there in an undamaged state on the 20th of March, 1871.

Upon a special case setting forth the above facts, the Court to draw inferences:—

Held, first, that the policy covered the whole journey from Shanghai to London, including the overland transit from Marseilles to Boulogne;

Secondly, that the detention of the silks in Paris by reason of the state of siege was a “restraint of princes” within the meaning of the policy; and consequently that, the goods being lost to the assured for an indefinite time, they were entitled to abandon, and to recover against the underwriters as for a total loss.

429 CB 518
Action for the recovery of 400% on two policies of insurance.

The following case was stated without pleadings, under a judge’s order:—

1. The plaintiffs effected insurances on silks by two policies in the ordinary form of Lloyd’s policies. By one, dated the 24th of March, 1870, which was for 15,000*l.*, they caused themselves, in the words of the policy, to be insured as follows, that is to say, “Lost or not lost, at and from Japan and [or] Shanghai to Marseilles and [or] Leghorn and [or] London viâ Marseilles and [or] Southampton, and whilst remaining there for transit, with leave to call at any ports or places in or out of the way, for all purposes, including all risks of craft to and from the steamers, each lighter or craft to be considered as separately insured, upon any kind of goods and merchandise, and also upon the body, tackle, apparel, &c., of and in the good ship or vessel called the — steamers or steamer per overland, or viâ Suez Canal,” &c.

2. The subject-matter to be insured was in the policy described as follows:—“The said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at 15,000*l.*, being on silks to be hereafter valued and declared.”

3. The risks insured against were described in the policy as

follows:—"Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage, they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all Kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners,—and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, or ship, &c., or any part thereof.

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4. In the margin of this policy is a memorandum in the following words:—"It is hereby agreed that the silks insured by this policy shall be shipped by Peninsular and Oriental Company, Messageries Impériales (1) steamers, and [or] the steamers of the Mercantile Trading Company of Liverpool only. And it is further agreed that, on shipments by the last-mentioned company's steamers, 20s. additional shall be charged."

5. In the other policy, dated the 8th of April, 1870, which was for 10,000*l.*, the voyage and the subject-matter insured, and the risks insured against, are described in terms nearly the same as in the first-mentioned policy. (2)

6. The defendant underwrote each policy for 200*l.*

7. Sixty-five bales of silk, the subject of this action, were shipped at Shanghai on board the Messageries Impériales steamer *Phase*, and consigned to the plaintiffs, under a bill of lading dated the 7th of July, 1870.

8. The silks were duly declared on the before-mentioned policies, and valued at 11,220*l.*: 3625*l.*, part of the said sum of 11,220*l.*, was declared on the first policy, and 7595*l.*, the residue of the said sum of 11,220*l.*, was declared on the second policy. These declarations were indorsed on the policies respectively.

9. At the time of these declarations, and thence until the giving of the notice of abandonment hereinafter mentioned, the plaintiffs were interested in the silks to the amount of the 11,220*l.*

10. The silks were carried in the steamer *Phase* from Shanghai

(1) Now called Messageries Nationales.

(2) Copies of the two policies and of all the other documents mentioned in the case were set out in an appendix, and were to be referred to if necessary.

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to Hong Kong. They were there transhipped to the steamer *Peiho* of the same company, the Messageries Impériales, and they were carried on board the *Peiho* through the Suez Canal direct to Marseilles. This is the ordinary course of business of the Messageries Impériales in carrying goods from Shanghai to Marseilles. Goods from Shanghai for Marseilles are carried by that company from Shanghai to Hong Kong by a branch line of steamers; and the steamers for Marseilles start from Hong Kong. The silks arrived at Marseilles on board the *Peiho* on the 27th of August, 1870.

11. The Messageries Impériales carry goods at through rates from Shanghai to London. Freight upon the silks was paid to the Messageries Impériales from Shanghai to London.

12. Before and at the time of the insurances, the steamers of the Messageries Impériales ran from the east to Marseilles and no further. Of those of the Peninsular and Oriental Company, one line ran to Marseilles and no further, another ran direct to Southampton. Those of the Mercantile Trading Company ran direct to Liverpool. Goods were never, in the ordinary course of business, carried from China, Japan, or India to London *viâ* Marseilles, except by the Messageries Impériales; and that company always sent such goods overland through France, that is to say, by the Lyons railway from Marseilles to Paris, and thence by the Northern railway to Boulogne, and thence to London. Silk is usually, but not invariably, sent by *petite vitesse*. It was well known among underwriters that goods sent from China, Japan, or India, to London *viâ* Marseilles, were always sent overland through France.

13. At the time when the silks reached Marseilles there was, and from the 15th of July previously had been, war between France and Germany.

14. On the 15th of July, 1870, a decree of the French government was issued, in accordance with the laws of France, whereby both the Lyons Railway Company and the Northern Railway Company were bound immediately to place at the disposal of the French minister at war all their means of transport, and whereby those companies were also empowered to suppress passenger or goods traffic so far as might be necessary to carry out the before-mentioned order.

15. Notice of the before-mentioned decree was on the 16th of

July, 1870, sent to every station on each of those railways respectively. A copy of this decree was posted up in every station of the Lyons railway.

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16. After the date of the before-mentioned decree each of the said railway companies continued to receive goods for carriage and to carry them in the ordinary course, except as hereinafter mentioned, until such carriage was interrupted at the times and in the manner hereinafter mentioned.

17. Goods sent from Marseilles to Paris and carried by the Northern railway from Paris to Boulogne for London, continued to leave Paris regularly till the 6th of September, and to arrive in London regularly till the 7th of September, 1870. On the 10th of September, 1870, carriage by the railway from Paris to Boulogne became, and thence until after the giving of the notice of abandonment hereinafter mentioned, and until after the commencement of this action continued to be, impossible, and ceased altogether, in consequence of the German armies having taken possession of parts of the said railway and intercepted all communication by such railway between Paris and Boulogne. During the month preceding the 10th of September, 1870, the time occupied in the journey between Marseilles and Paris varied greatly. The time, ordinarily occupied in that journey is eight days for goods sent by *petite vitesse*.

18. On the 29th of August, 1870, the plaintiffs received in London a letter from their agent at Shanghai informing them of the shipment of the silks. This letter came from Shanghai to Marseilles by post, in the same steamer with the silks.

19. On the same 29th of August, 1870, the plaintiffs wrote to their agents, Messrs. Rodocanachi, of Marseilles, a letter containing the following terms,—“ We have received advices from Shanghai of the 65 bales of silk R. S. C. 1 @ 65, consigned to us by the *Phase* steamer and overland, that is to say, by the mail which has just arrived; and we find in the advices the following clause: ‘To be warehoused at Marseilles at the company’s expense during one month, and to await orders from the consignee. Be good enough, therefore, to give orders to the agents that the silks may be forwarded to London.’” On the same day, the plaintiffs wrote to their agents at Marseilles another letter, containing the follow-

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ing terms,—“The first sixty-five bales from Shanghai are coming by the French steamer; and the freight is paid to London. We do not doubt that you have given orders to send them here. They are insured including war risk.” These letters would in the ordinary course of post reach Marseilles on the 31st of August, 1870.

20. On the 31st of August, 1870, Messrs. Rodocanachi, of Marseilles, sent to the directors of the maritime service of the Messageries Impériales a letter of which the following is a translation:—

“Marseilles, 31st August, 1870.

“The Director of the Maritime Service of the Messageries Impériales, in town.

“We receive the orders of Messrs. Rodocanachi, Sons, & Co., to dispatch to London the sixty-five bales of silk R. S. C. arrived from China by the French steam-boat *Peiho*, which you hold in warehouse to their order. We forward you their order at once, begging you to have the goodness to execute it to-day if possible.

(Signed) “T. & K. Rodocanachi.”

21. On the same 31st of August, 1870, Messrs. Rodocanachi of Marseilles wrote to the plaintiffs, in London, a letter from which the following is an extract: “We are glad to hear that you have insured the sixty-five bales of silk, including war risk; and we have ordered them to be forwarded to London, as you will see by the inclosed copy of our letter to the Messageries Impériales.”

22. The silks were delivered to the Lyons railway on the 2nd of September, 1870, and a receipt for them was given by that company.

23. The silks were dispatched from Marseilles on the 3rd of September, 1870, by *petite vitesse*.

24. The silks arrived at Bercy on or before the 13th of September, 1870. Bercy is the railway station in Paris at which goods sent by the Lyons railway arrive.

25. At the time of the arrival of the silks at Marseilles, and thence until and after their arrival at Bercy, the German armies had invaded and occupied a large part of France, and were advancing upon and gradually surrounding Paris, which state of things continued until the 19th of September, 1870, on which day the German armies completely invested Paris. From the last-

mentioned day until the giving of the notice of abandonment, and thence until the commencement of this action, they completely surrounded and besieged Paris, and held military possession of all the roads leading out of Paris, and prevented communication between Paris and all other places; by reason whereof, it was during all the time aforesaid impossible to remove the silks from Paris.

26. On the 29th of September, 1870, whilst the silks were detained in Paris as above mentioned, Messrs. Rodocanachi, of Marseilles, received from the Messageries Impériales a letter informing them of the detention of the silks at Bercy.

27. On the 7th of October, 1870, the plaintiffs gave notice of abandoning the silks to the defendant and the other underwriters.

28. After the commencement of this action the silks were forwarded to London; and they arrived in London in an undamaged state on the 20th of March, 1871.

29. Between the 17th of March and the 9th of May, 1871, a correspondence took place between the attorneys for the respective parties relative to the liability of the underwriters on the policies. The plaintiffs, taking upon themselves to act for the benefit of the underwriters, but having no authority in fact from the defendant or the other underwriters to do so, dealt with the silks in the manner hereinafter mentioned.

30. On the 2nd of September, 1870, the plaintiffs had by a written contract bearing date that day sold the silks "to arrive," on the terms that the prompt should be four months from working, and that, in the event of the silks not arriving, the contract was to be null and void.

31. When the silks arrived in London, the prices of silks were about the same as at the time when the contract of the 2nd of September, 1870, was made.

32. The purchasers elected to take and did receive the silks after their arrival in London under the last-mentioned contract, and paid the plaintiffs the net price of 9362*l.* 12*s.* 6*d.* in accordance with the terms of the contract.

33. The Court were to draw inferences of fact.

34. A claim was made on behalf of the plaintiffs before the arbitrator by whom the case was settled, to recover as for a partial loss of the silks, first, in respect of an alleged loss of weight in the silks

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by a natural process of drying during and in consequence of their detention in Paris, and, secondly, in respect of loss of interest upon the purchase-money to be received for the silks, during the period of such detention.

The questions for the Court were,—1. Whether the silks were covered by the policies at the time of the alleged loss: 2. Whether the plaintiffs were entitled to recover as for a total loss of the silks: 3. Whether the plaintiffs were entitled in point of law to recover as for a partial loss in respect of the matters mentioned in par. 34, or either of them.

If the Court should be of opinion in favour of the plaintiffs on the first question, and that there had been a total loss, judgment was to be entered for the plaintiffs for an amount to be ascertained as the Court should direct, with costs. If the Court should be of opinion in favour of the plaintiffs on the first question, and that the plaintiffs were entitled in point of law to recover as for a partial loss in respect of the matters referred to in the third question, or either of them, the case was to be referred back to the arbitrator to find what, if anything, was recoverable in respect thereof; and judgment was to be entered accordingly.

If the Court should be of opinion in favour of the defendant upon the first question, or upon the second and third questions, judgment was to be entered for the defendant for his costs.

May 29. *Field, Q.C.* (*Thesiger* with him), for the plaintiffs. The first question is whether the policies upon which this action is brought covered a terrene risk. The intention was to cover all risks to the goods during any portion of the voyage or transit mentioned in the policies in which it is the usual and recognised practice that the goods shall be transmitted by land. And the language of the policies is abundantly sufficient to carry out that intention. The next question, and one which presents more difficulty, is, whether there was an arrest or restraint of princes within the policies, and a total loss thereby. There is no direct decision of the Courts of this country upon the point: but, in the United States, in the cases of *Olivera v. Union Insurance Co.* (1) and *Saltus v. United Insurance Co.* (2), it was held that there was an arrest or

(1) 3 Wheaton's Rep. 183.

(2) 15 Johns. 523.

restraint within a similar clause, where the ship was prevented from leaving port by a blockade. What took place in this case is precisely analogous to a state of blockade. It has been held that if, while a vessel is on her voyage, the master learns that her port of destination is closed by an embargo, and abandons the adventure, this is not a loss by a peril insured against: *Hadkinson v. Robinson* (1); *Lubbock v. Rowcroft*. (2) But the case of a ship being prevented from going into a port and that of one being restrained from leaving it are totally distinguishable. In the former case, the proximate cause of the loss is not the embargo or blockade, but the course adopted by those in charge of the vessel to avoid the risk of capture or detention. In the latter case, there is an actual restraint of the vessel by the dominant power. The special case here expressly finds that, in consequence of the hostile position of the enemy surrounding Paris, it was impossible that the assured could obtain their goods. See also *Barker v. Blakes*. (3) In *Geipel v. Smith* (4), in the case of a charterparty, it was held that a state of blockade was a restraint of princes. It must be admitted that that case is not a decisive authority, seeing that the doctrine of *causa proxima* has not been applied to the case of a charterparty, as in the case of marine insurance. It will probably be contended that our law differs from that of America in the rule which must govern this case, that *Olivera v. United Insurance Co.* (5) is opposed in principle to *Hadkinson v. Robinson* (1), and that, if this case arose in America, the Courts would hold that the ship's being prevented from going into port would be a restraint. But, if there be no restraint under the circumstances of this case, there could be none unless the goods were actually seized and in the possession of the belligerent power. Such a construction would give no different meaning to capture, arrest, and restraint. Then, if this be a restraint of princes, there was clearly a total loss within the general principle so lucidly explained in *Roux v. Salvador*. (6)

June 2. *Day, Q.C.*, for the defendant. A policy of marine insurance is ordinarily confined to marine risks; it only covers the goods whilst being water-borne; and it requires express and strong

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(1) 3 B. & P. 388.

(2) 5 Esp. 50.

(3) 9 East, 283.

(4) Law Rep. 7 Q. B. 404.

(5) 3 Wheaton's Rep. 183.

(6) 3 Bing. N. C. 266.

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words to extend it to terrene risks. There are no such words in this policy; but, on the contrary, it bears internal evidence that it was never intended to have the extended meaning contended for on the part of the plaintiffs. It is said in 1 Arnould on Insurance, 4th ed., 369, that "the general rule is clear, that the underwriter in a sea-policy insures only against sea risks; the risk on goods, therefore, ends directly they are put on terra firma, unless they are placed there only for a temporary purpose, or under such circumstances as to be protected by the usage of the trade." For this general position Mr. Arnould cites *Harrison v. Ellis* (1), contrasted with *Pelly v. Royal Exchange Assurance Co.* (2) and *Brough v. Whitmore.* (3) In *Harrison v. Ellis* (1), the policy contained a memorandum "with liberty to load, re-load, exchange, sell, or barter, all or either, goods or property on the coasts of Africa and African islands, and with any vessels, boats, factories, and canoes, &c., without being deemed a deviation," and the Court held that there was nothing in the language to indicate an intention to extend the policy to a terrene risk. So here, there is nothing in this policy to shew that a terrene risk was intended to be covered. The voyage contemplated was from Japan or Shanghai to London.

[BRETT, J. Viâ Marseilles.]

The voyage or transit contemplated might have been performed without any land journey; the memorandum was inserted merely for the purpose of rendering the assured irresponsible for a deviation if they elected that mode of transit.

[BRETT, J. The question is whether it does not make the journey from Marseilles to Boulogne part of the voyage.

BOVILL, C.J. Whether the goods came by way of Marseilles or Southampton, they must come part of the way overland.]

That may be; but they might have come by the Mercantile Trading Company of Liverpool, and so all the way by sea. There would be no deviation, if the goods came overland from Suez to Alexandria; but they would not be covered during that transit by this policy.

[BRETT, J. That is precisely the same question.]

Then, has there been any loss at all? The goods arrived in

(1) 7 E. & B. 465; 26 L. J. (Q. B.) 239. *2 In 25. 900.*

(2) 1 Burr. 341.

(3) 4 T. R. 206.

safety in Paris in charge of the carriers appointed by the plaintiffs. They always remained at the disposal of the plaintiffs, though it was uncertain from day to day when they could pursue the voyage. They continued there only because it was inconvenient to remove them. It was the same as if the ship was wind-bound. A mere retardation of the adventure, the goods not being of a perishable nature, does not constitute a loss by a peril insured against: *Hunt v. Royal Exchange Assurance* (1); *Anderson v. Wallis*. (2) Then, as to the exception of restraint of princes: There is a wide distinction between an ordinary contract with an exception of this sort, and a contract of insurance: *Geipel v. Smith*. (3) In marine policies, the proximate cause of loss only, and not the remote cause, is regarded: *Barker v. Blakes* (4); *Forster v. Christie* (5); *Taylor v. Dunbar*. (6) The exception of restraint of princes has never been extended to blockade. In *Hadkinson v. Robinson* (7), Lord Alvanley says: "The policy includes capture and detention of princes; and any loss which necessarily arises from such acts is a loss within the policy. But it has appeared to me that, where underwriters have insured against capture and restraint of princes, and the captain, learning that if he enter the port of his destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating to the total destruction of the thing insured." Embargo is entirely distinct from blockade; it is a hostile act of the rulers at the port.

[BRETT, J. "Seizure" is a taking possession of goods for the purpose of confiscating them. "Arrest" is a taking with the intention of restoring them at one time or other. "Restraint" is the preventing the goods from being got away, without laying hands upon them. Is there any real distinction between blockade and the state of siege occurring in this case?]

There is no analogy between a land siege and a state of naval blockade. "An embargo," says Mr. Arnould, vol. 2, p. 700, 4th ed., "is an order of government (generally, but not always, issued in

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(1) 5 M. & S. 47.

(5) 11 East, 205.

(2) 2 M. & S. 240.

(6) Law Rep. 4 C. P. 206.

(3) Law Rep. 7 Q. B. 404.

(7) 3 B. & P. 388, at p. 392.

(4) 9 East, 283.

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contemplation of hostilities,) prohibiting the departure of ships or goods from some or all of the ports within its dominions." With respect to blockade, Wheaton (International Law, 2nd ed. p. 843) says: "Where goods were sent into a blockaded port before the commencement of the blockade, but re-shipped by order of the neutral proprietor, as found unsaleable during the blockade, they were held entitled to restitution. For, the same rule which permits neutrals to withdraw their vessels from a blockaded port extends also, with equal justice, to merchandize sent in before the blockade, and withdrawn *bonâ fide* by the neutral proprietor." *The Potsdam* (1); *Olivera v. Union Insurance Co.* (2) The difficulty or impossibility of removal of the goods here arose, not from any hostile intervention of either of the belligerents, but was occasioned by the state of things existing outside of Paris.

Field, Q.C., in reply. This is not a mere marine policy. The transit contemplated was to be performed partly by land and partly by sea; and the insurance was to continue throughout the whole of that journey, and until the goods "should arrive at as above." It distinctly covers the whole journey from Shanghai to London via Marseilles: *Boehm v. Combe*. (3) What else, as Lord Ellenborough asked in that case, could the assured mean to insure? Wheaton, at p. 819, places siege and blockade in the same category. "Another exception," he says, "to the general freedom of neutral commerce in time of war is to be found in the trade to ports or places besieged or blockaded by one of the belligerent powers. Thus, Grotius (4) forbids the carrying anything to besieged or blockaded places, 'if it might impede the execution of the belligerents' lawful designs, and if the carriers might have known of the siege or blockade; as in the case of a town actually invested, or a port closely blockaded, and when a surrender or peace is already expected to take place.'" Chief Justice Marshall, delivering the judgment of the Supreme Court of the United States in *Olivera v. Union Insurance Co.* (5), says: "If a blockade be a 'restraint,' the insured are protected against it, although it be neither an 'arrest' nor a 'detainment.' What, then, according to common

(1) 4 C. Rob. Rep. 89.

(2) 3 Wheaton's Rep. 183.

(3) 2 M. & S. 172.

(4) De Jur. Bel. ac Pac. lib. iii. c. 1,

§ 5, n. 3.

(5) 3 Wheaton's Rep. 183, 189.

understanding, is the meaning of the term 'restraint?' Does it imply that the limitation, restriction, or confinement must be imposed by those who are in possession of the person or thing which is limited, restricted, or confined? or is the term satisfied by a restriction created by the application of external force? If, for example, a town be besieged and the inhabitants confined within its walls by the besieging army, if in attempting to come out they are forced back, would it be inaccurate to say they are *restrained* within these limits? The Court believes it would not; and, if it would not, then with equal propriety may it be said, when a port is blockaded, that the vessels within are confined or restrained from coming out. The blockade force is not in possession of the vessels inclosed in the harbour, but it acts upon and restrains them. It is a vis major applied directly and effectually to them, which prevents them from coming out of port. This appears to the Court to be, in correct language, a 'restraint' of the power imposing the blockade; and, when a vessel attempting to come out is boarded and turned back, this restraining force is practically applied to such vessel."

[BRETT, J. That seems to be exactly to the point.]

Most of the cases relied on for the defendants are decisions upon charterparties. The doctrine of *Geipel v. Smith* (1) is carried out in the cases of *The Heinrich* (2), *The San Roman* (3), and *The Express*. (4) The assured is clearly restrained from carrying on the adventure, when he is prevented from getting the goods to carry. The distinction between a mere retardation and the loss of the voyage is well illustrated by *Roux v. Salvador*. (5)

[BOVILL, C.J. In *Boehm v. Combe* (6) it seems to have been assumed that the risk was covered by the policy. It was not contended that the policy did not apply to the land part of the voyage.]

BOVILL, C.J. I cannot entertain the least doubt that the object of the plaintiffs in effecting these policies was to cover the goods from the time of their departure from Shanghai until they should

(1) Law Rep. 7 Q. B. 404.

(2) Law Rep. 3 A. & E. 424.

(3) Law Rep. 3 A. & E. 583.

(4) Law Rep. 3 A. & E. 597.

(5) 3 Bing. N. C. 266.

(6) 2 M. & S. 172.

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have arrived at the terminus of the journey, viz. London, and that their general intention was that the policies should cover all risks during such transit as well by land as by water. But the question is whether that intention has been expressed by the terms in which the policies are framed. That must depend mainly upon the policies themselves; but, at the same time, in order to ascertain to what the words of the policies were intended to apply, we must not forget what was the usual course of business in such transactions. The course of business, as stated in par. 12 of the special case, was this,—“Goods were never, in the ordinary course of business, carried from China, Japan, or India to London viâ Marseilles, except by the Messageries Impériales; and that company always sent such goods overland through France, that is to say, by the Lyons railway from Marseilles to Paris, and thence by the Northern railway to Boulogne, and thence to London.” Then there is this further statement,—“It was well known among underwriters that goods sent from China, Japan, or India to London viâ Marseilles, were always sent overland through France.” It was further admitted on the argument, though there is no statement to that effect in the special case, that silk sent to London viâ Southampton would in the ordinary course of business pass by railway from Southampton to London; and it must be assumed that this also was well known among underwriters. Now, what are the terms of these policies? The statement is that the plaintiffs “caused themselves to be insured, lost or not lost, at and from Japan and [or] Shanghai to Marseilles, and [or] Leghorn, and [or] London viâ Marseilles and [or] Southampton, and whilst remaining there for transit,” &c. What meaning are we to attach to these words? According to the usage, the transit to London viâ Marseilles necessarily includes an overland journey through France; and the statement in the policies must be taken to mean the same as if it had been expressly stated therein that the insurance was to protect the goods whilst on their transit by railway from Marseilles to Paris and thence to Boulogne, or, if viâ Southampton, whilst passing by railway from Southampton to London. The description, therefore, of the entire voyage or journey clearly embraces a passage by land as well as by water. The fair interpretation of the language, as it seems to me, is, that the

goods were intended to be covered during the entire transit from Shanghai to London, whether by land or by sea. Mr. Day contended that the words "whilst remaining there for transit" shew that the policies were only intended to cover the goods on land whilst awaiting re-shipment either at Marseilles or at Southampton, and not any transit by land. But I cannot adopt that construction. If necessary, I should hold that those words were intended to cover the period of detention for the purpose of the goods being forwarded either by land or by water. There is another part of the policies which shews that the parties contemplated that a portion of the voyage would be performed on land, viz. that which describes the voyage to be "in the good ship or vessel called the ——— steamers or steamer per overland or viâ Suez Canal." The words "steamers or steamer per overland" clearly indicate that the goods are intended to go overland during a portion of the journey. That seems to me to confirm the general view which I have expressed: the risk was to commence with the loading of the goods at Japan or Shanghai, and to continue until their arrival in London by a route partly by water and partly by land. And I believe that policies of this kind are by no means uncommon. The land transit from Marseilles to Boulogne was, in my opinion, clearly contemplated and is covered by these policies.

Then arises the question whether, by reason of what occurred after the arrival of the goods in Paris, there has been a loss within the terms of the policies. The perils against which the policies protect the assured are, amongst others, "arrests, restraints, and detainments of all Kings, princes, and people, &c., and all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes, or ship, &c., or any part thereof." These latter words refer to losses ejusdem generis as those which precede them. The goods having arrived at Marseilles on the 27th of August, 1870, were forwarded in the usual course by the Lyons railway to Paris, and arrived there (at the station at Bercy) on the 13th of September. On the 10th of September carriage by the railway from Paris to Boulogne became impossible in consequence of the German armies having taken possession of parts of the railway and intercepted

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the communication; and this state of things continued until after the notice of abandonment and after the commencement of this action. The 25th paragraph of the case states that, "at the time of the arrival of the silks at Marseilles, and thence until and after their arrival at Bercy, the German armies had invaded and occupied a large part of France, and were advancing upon and gradually surrounding Paris, which state of things continued until the 19th of September, 1870, on which day they had completely invested the city." From that day they entirely surrounded and besieged Paris, and held military possession of all the roads leading out of it, and prevented communication between Paris and all other places; "by reason whereof it was impossible to remove the silks from Paris." On the 7th of October, notice of abandonment was given to the underwriters; and the question is whether, under the circumstances, there was a loss of the goods within the meaning of the policies,—a constructive total loss,—so as to entitle the plaintiffs to abandon.

No doubt the goods existed in specie and uninjured. It is equally clear that, in our law, a mere delay or interruption of the voyage will not give the assured a claim against the underwriters, unless such delay is caused by a peril insured against, and the voyage or adventure is thereby altogether frustrated. The question therefore is, whether there has been such a loss in this case. On the part of the plaintiffs it is contended that there was a restraint by the German armies surrounding Paris and making it impossible to remove the goods, and so a loss within the terms of the policies. For the defendant it is contended that the circumstances shew a mere delay, which by our law gives no claim against the underwriters: there must be a loss by a peril insured against. What is the effect of a state of siege such as existed here? It is said that a siege differs from a blockade, and that the principles of law applicable to the one are not applicable to the other. The American Courts, it seems, have treated the case of a vessel kept within a blockaded port as being precisely within the same principle as goods detained within a besieged town, and have considered the latter as being *à fortiori* a restraint of princes. Siege and blockade are also placed upon the same footing in this respect by Grotius and by Wheaton; and I certainly see no

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difference between them for the purpose of a claim upon a policy, or between a blockade and an embargo, so far as regards the question of restraint of princes. There are numerous cases in which the question has arisen whether a blockade was a restraint of princes; but all of them were cases where the ship or the goods had been prevented from entering the blockaded port; and the answer was that there was no such restraint, the immediate cause of their not entering being the desire of the assured not to encounter the risk of the blockade. Whenever the question may arise when the ship or the goods were within the blockaded port, *Geipel v. Smith* (1) would, as it seems to me, be a distinct authority. It is true that the question there arose upon a charterparty, —whether the defendant was justified in putting an end to the contract by reason of the blockade of the port of discharge: but it became important to consider whether or not a blockade was a restraint of princes; and Cockburn, C.J., thus deals with that question (2): “Is a blockade a restraint of princes? I think it is. It is an act of a sovereign state or power; and it is a restraint, provided the blockade is effective; and in the eye of the law a blockade is effective if the enemy’s ships are in such numbers and position as to render the running of the blockade a matter of danger, although some vessels may succeed in getting through. In such a case, the obstacle arises from an act of the state of one of the belligerent sovereigns, and consequently constitutes a restraint of princes. The case, therefore, is brought within the exception in the charterparty.” And Blackburn, J., says (3): “I am unable to see why this is not a restraint of princes. It is clearly a restraint by the then Emperor of the French preventing the cargo from being carried on to Hamburg.” It is assumed throughout the case that, if the vessel had been *within* the blockaded port, her detention there would have amounted to a restraint of princes. *Forster v. Christie* (4) has also been cited. The decision there was that the mere circumstance of the master being deterred from continuing the voyage from fear of a blockade did not constitute a restraint of princes: but the whole argument assumes that, if the vessel had been within the blockaded port,

(1) Law Rep. 7 Q.B. 404.

(3) Law Rep. 7 Q.B. at p. 412.

(2) Law Rep. 7 Q.B. at p. 410.

(4) 11 East, 205.

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the decision must have been otherwise. Mr. Day has contended that the words "restraint of princes" in a charterparty must receive a different construction from that which they would receive in a policy of insurance. I am not, however, aware of any such distinction having ever been made; nor do I see upon what principle it can be rested.

So stands the law upon this subject in our Courts. How has it been dealt with in the Courts of America? There is a very important decision of *Olivera v. Union Insurance Company* (1), which I believe has been recognised and acted upon ever since, where the distinction suggested between siege and blockade was repudiated. The judgment of the Supreme Court in that case, as delivered by Marshall, C.J., contains this passage: "What, then, according to common understanding, is the meaning of the term 'restraint?' Does it imply that the limitation, restriction, or confinement must be imposed by those who are in possession of the person or thing which is limited, restricted, or confined? or is the term satisfied by a restriction by the application of external force? If, for example, a town be besieged and the inhabitants confined within its walls by the besieging army, if, in attempting to come out, they are forced back, would it be inaccurate to say that they are restrained within those limits? The Court believes it would not." It seems to me that those observations are precisely applicable to the present case, and I entirely concur in them. The case shews that exterior force was applied to prevent the progress of these goods to their destination. Were the owners, then, entitled to give notice of abandonment to the insurers? It is true, it is not a case of actual capture, where there is no hope of the recovery of the goods. It seems rather to fall within the category of an embargo or of goods detained in a blockaded port, —something in the nature of a hostile detention or restraint by a competent authority. What, then, is the law applicable to such a state of things? In *Goss v. Withers* (2), Lord Mansfield says: "I cannot find a single book, ancient or modern, which does not say that, 'in case of a ship being taken, the insured may demand as for a total loss, and abandon.' And what proves the proposition most strongly is, that, by the general law, he may abandon

(1) 3 Wheaton's Rep. 183.

(2) 2 Burr. 683, 696.

in the case merely of an *arrest*, on an embargo, by a prince *not* an enemy. Positive regulations in different countries have fixed a precise time before the insured should be at liberty to abandon in that case. The fixing a precise time proves the general principle." *Rotch v. Edie* (1) is an authority to the same effect. We have no fixed time in our law for the giving of notice of abandonment; but it must be given within a reasonable time, regard being had to the nature and circumstances of each case. Subject to that, and to there being in this case a "restraint of princes," it seems to me that the assured had a right to abandon the goods to the underwriters, provided that notice was given in due time. No question is raised here as to the time at which the notice of abandonment was given: nor do I think any such question could have been raised. The risk, therefore, being one which, as it seems to me, was covered by the policies, and the circumstances disclosed in the case amounting to a restraint of princes, I am of opinion that our judgment should be for the plaintiffs.

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KEATING, J. I am of the same opinion. If our decision in this case had rested exclusively upon the terms of the policies, I should have desired time to consider whether they were not confined to marine risks. But, coupled with the findings in the special case, I am of opinion that it was the intention of all parties that they should extend to cover the risk in question,—a *terrene* risk. It was evidently contemplated that the goods insured should be sent from Marseilles across France to Boulogne, and thence to London; and, coupled with the findings, the policies were intended to include all risks on the land portion of the journey. It was well known to all parties that the ordinary mode of carrying silks from Shanghai to London was by that route. If, then, land risks on that part of the transit were within the policies, was there a loss such as to justify an abandonment? I agree with my Lord that there is a close analogy between a siege of a town and a blockade of a port. There are few English cases to be found of English goods blockaded in a foreign port; but there are several cases where the question has arisen as to goods which were prevented by a blockade from getting in. It seems to me that goods which

(1) 6 T. R. 413.

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are within a besieged or a blockaded town or port, stand precisely in the same position as goods detained under an embargo. It is true that, in the one case the detention is the act of the sovereign of the state in which the goods are, and in the other it is the act of the enemy. But in both a restraint is placed upon the owner of the goods by a sovereign power. That is precisely this case. It is found that it was impossible, in consequence of the German armies having closely invested Paris, to remove the silks from the railway station there. I apprehend that was a loss which was covered by these policies. The goods were for an indefinite time lost to the assured. If, therefore, the case of a besieged town is analogous to that of a blockaded port, as I think it is, the assured were clearly entitled to abandon.

BRETT, J. I also am of opinion that the policies in question cover the land transit from Marseilles to Paris, because by the words of the policies the land portion of the transit is made part of the voyage insured. A policy of insurance is to be construed like any other contract. The ordinary form of a marine policy has received a construction in numerous decisions of the Courts. The same rules cannot be applied exactly to a policy in an extraordinary form; but those rules of construction must be applied as far as the circumstances of the case will admit of their application. All policies are framed in a somewhat similar manner. First, they describe the voyage insured; and the duration of the risk is made applicable to that voyage: and then the risks intended to be covered by the policy are enumerated. The course of the voyage as described in these policies is, "from Japan and [or] Shanghai to Marseilles and [or] Leghorn and [or] London viâ Marseilles and [or] Southampton, and whilst remaining there for transit, with leave to call at any ports or places in or out of the way for all purposes, including all risks of craft to and from the steamers, each lighter or craft to be considered as separately insured, upon any kind of goods, &c., in the good ship, &c., steamers or steamer, per overland, or viâ Suez Canal," &c. Taken by themselves, these words would not completely describe the nature of the intended voyage. To explain their meaning recourse must be had to the known and

usual course of business. The special case therefore finds, in par. 12, as follows:—"Goods were never, in the ordinary course of business, carried from China, Japan, or India, to London viâ Marseilles, except by the Messageries Impériales; and that company always sent such goods overland through France, that is to say, by the Lyons railway from Marseilles to Paris, and thence by the Northern railway to Boulogne, and thence to London. It was well known among underwriters that goods sent from China, Japan, or India, to London viâ Marseilles, were always sent overland through France." It was, therefore, manifestly contemplated by all parties that the land transit from Marseilles to Boulogne should form part of the voyage insured. The voyage which the assured intended to insure, and the risks of which the underwriters were contented to accept, were, I apprehend, the ordinary voyage from Shanghai to London, with the ordinary stoppages, and to be performed in the ordinary manner, involving interruptions of the journey at different times and places. The goods are to be covered whilst on board several steamers, including all risks of craft to and from the steamers, whilst remaining at Marseilles or Southampton for transit, and during the transit by land from either of those places to London. *Pelly v. Royal Exchange Assurance Co.* (1), *Brough v. Whitmore* (2), and *Boehm v. Combe* (3), are authorities to shew that the transit by land is covered by the policy where it is distinctly made part of the voyage insured. Upon these authorities, and upon the construction of these policies, I am clearly of opinion that the transit overland from Marseilles to London was part of the voyage intended to be insured, and that there is no difficulty in adapting the words used to the voyage insured, and, if so, that the duration of the risk must be made applicable to that voyage.

If, then, the land portion of the voyage was covered by these policies, the next question is whether there has been a loss by a peril insured against. I am of opinion that there was a loss by reason of a "restraint of princes." It has been contended on the part of the plaintiffs that goods within a besieged town stand in a similar position in this respect with goods in a blockaded port, which have been held to be within the words "restraint of princes." I think that the American cases, with the single exception of

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(1) 1 Burr. 341.

(2) 4 T. R. 206.

(3) 2 M. & S. 172.

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Olivera v. Union Insurance Co. (1), do not afford us any assistance. By the American law, retardation is a loss within the policy. Our law differs in that respect, upon this ground, that, if the master of the ship, of his own accord, or in obedience to the orders of the officers of the Queen, abstains from entering a blockaded port, the *causa proxima* is not the blockade, but the voluntary act of the master. But no English case has yet decided that, where the ship or goods are detained within the blockaded port, that would not be a case falling within the words "restraint of princes." It is clear that this is not a case of capture. Capture means the hostile seizure of goods with intent to deprive the owner of them. Nor is it an arrest, to constitute which our law (except in the case of a blockade, where they are within the blockaded port,) requires that the goods should be actually seized and taken out of the possession of the owner. There remain then the words "restraints and detentions of all Kings, princes, and people." Now, we must apply here the ordinary rule of construction, which is, where different words are used in a document, to give its appropriate meaning, if possible, to each of them. Now, I apprehend that goods are restrained or detained where they are by the application of a hostile force prevented from being carried to their destination. That that applies to embargo there seems to me to be no doubt; and there is equally, in my opinion, no doubt that it applies to blockade: in both it is intended that the ship or goods shall not be removed. The judgment of Marshall, C.J., in *Olivera v. Union Insurance Co.* (1), seems to me to be a strong authority, for the interpretation we are now putting upon "restraints of princes" in an ordinary policy. The goods are as much practically restrained, and equally lost to the owner, when in a besieged town, as if they were in a blockaded port. The case last cited, and the passage referred to in Wheaton's *International Law*, 2nd ed. p. 819, satisfy my mind that goods hostilely detained in a besieged city or town fall within the words "restraint of princes." What, then, is the amount of the loss which the assured have sustained? Inasmuch as no one could tell what would be the extent of the restraint, I think they were entitled to give notice of abandonment, and to claim for a total loss.

GROVE, J. I am of the same opinion. Upon the first point, which appeared to me not to be an arguable one, it was said that the silks might have been brought *viâ* Marseilles to London by sea. But these policies manifestly contemplated that the voyage should be performed in the ordinary manner, partly by land transit and partly by sea. Mr. Day contended that the whole language of the policy had relation throughout to maritime risks. The general words which he relied on are no doubt copied from an old form of sea policy. But the real question is, what was the voyage intended to be insured. It was from Japan or Shanghai to (amongst other places) London *viâ* Marseilles; and the statements in par. 12 of the case shew that the usual and known course of business was (and indeed the only course where goods were brought from the East by steamers of the Messageries Impériales), to perform a part of the transit, viz. from Marseilles to Paris and from Paris to Boulogne, overland. If the parties had intended the policies to be strictly marine policies, they would naturally have excepted that portion of the journey. I agree with the rest of the Court that the manifest intention was to cover the whole voyage from Japan or Shanghai to London.

Then, was the detention of the goods in Paris a "restraint of princes?" But for the cases in our Courts where the distinction is drawn between goods which are detained in a blockaded port and goods which are prevented from entering, there would not have been much room for doubt. One can easily see why the latter should not be construed as a case of restraint. It is more like an injunction. But, where goods are shut up and cannot be got out, I am at a loss to see how it can be said that they are not subjected to restraint. The authority of Grotius and of Wheaton shews clearly that a siege is even a more effective restraint than a blockade. There is always a chance of successfully running a blockade. But the special case finds not only that the siege of Paris was effective and the investiture complete, but that it was "impossible to remove the silks from Paris." The only other question is, whether this was such a loss as to justify a notice of abandonment. The loss or destruction of species could not have been intended by this provision against restraint of princes. Restraint involves the idea that the goods remain undamaged. What greater loss can an

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assured sustain than the detention of the thing insured for a considerable and indefinite time by a hostile power? I think the plaintiffs were entitled to abandon, and to recover as for a total loss.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Markby & Tarry.*

Attorneys for defendant: *Waltons, Bubb, & Walton.*

June 20.

RANSFORD v. MAULE.

Bankrupt—Filing a Declaration of Inability to pay—Bankruptcy Act, 1869
(32 & 33 Vict. c. 71), s. 6.

902438
 The filing of a declaration of inability to pay by a debtor under s. 6, subs. 4, of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), is complete on the delivery of the document, by a properly authorized person to the proper officer at the proper office, with intent that it should be filed or placed on record in the ordinary manner.

INTERPLEADER ISSUE to try whether certain goods seized by the sheriff under a fi. fa. issued out of this Court upon a judgment obtained by the defendant against two persons trading in partnership under the name of Stocken & Harris, were the property of the plaintiff as trustee in bankruptcy of Stocken & Harris.

At the trial before Martin, B., at Huntingdon, at the Spring Assize, 1873, it was proved that the bankrupts, Stocken & Harris, carried on business at St. Ives. On Saturday, the 12th of October, 1872, George Gaches, a solicitor at Peterborough, received from Wallingford & Day, solicitors of St. Ives, a declaration of insolvency signed by Stocken and Harris, with instructions to file it in the county court of Peterborough as early as possible. Gaches accordingly attended at the registrar's office at 10.30 of that day, and left the declaration with one Tuck, a clerk there. Tuck told him there was already a declaration of insolvency on the file (which was signed by Stocken on behalf of the firm). Gaches desired the clerk to inform the registrar that he had left the declaration, and the clerk then placed it within the covers of a file. About 12 o'clock on the same day Gaches called again at the office and saw the registrar. The clerk was called into the registrar's room

with the file. The registrar took out the declaration and handed it to Gaches, observing that it was useless to file it, there being already a declaration of insolvency on the file; and he recommended Gaches to telegraph to Wallingford & Day to that effect. Gaches went away, taking the declaration with him. Wallingford & Day sent a clerk to Gaches on the following day (Sunday), and Gaches arranged with him to go to St. Ives early the next morning to see one Watts, a solicitor there, by whom the first declaration of insolvency had been filed. Gaches accordingly saw Watts, and obtained from him an authority to take that declaration off the file. Gaches returned to Peterborough on Monday, the 14th, with the authority signed by Watts and the declaration of insolvency signed by Stocken and Harris, and left them with the registrar's clerk at the office at 10.30 a.m. Mr. Gaches stated that he was acting as agent for Wallingford & Day, and had no authority from them to take back the second declaration after he had handed it to the clerk.

The document in question, which was produced, bore the following indorsement of the clerk, "Filed 14th October, 1872, at 10.30 a.m.," the 12th, which was the date first put, having been erased by drawing a pen through it.

Tuck, the registrar's clerk, who was called for the plaintiff, deposed to the following effect:—I had charge of the bankruptcy proceedings. I receive all papers, except when the registrar is in. If no question arises, I file them. I call filing them putting them on the file. The file comes with pasteboard backs. I acted in the bankruptcy of Stocken & Harris in receiving certain documents. I received the first declaration (of the 11th of October) from a clerk in the office, named Eaton. I put it on the file directly I received it. I believe I put the strings through it. I do not always put the strings through the papers: I sometimes merely put them into the case. I indorsed the first declaration, "Filed 11th October, 1872, 3.40." This refers to the time Eaton stated he had received it. On the 12th I received another declaration of inability to pay from George Gaches. He brought it about 10.30. I remarked there was a declaration already filed. He said he would call again and see the registrar. I was called into the registrar's room between 12 and 12.30 the same day. I

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brought in the file of the proceedings in Stocken & Harris's case. I put it on the registrar's desk. The second declaration was in the case when I took it in. On Monday, the 14th, Gaches came again. He brought back the second declaration and the authority to withdraw the first. I either strung it [the second declaration] upon the file or put it in the case. I made no indorsement upon it at that time. I made one two days afterwards. I made the minute, "Filed 12th October, 1872." I afterwards altered it to the 14th. I did so because it was the day upon which it was brought back to me to be filed.

On cross-examination this witness said: I placed the second declaration on the file on Monday, the 14th. Sometimes I put in the documents before I put them on the file; sometimes I do not.

The registrar, who was called for the defendant, said: The first declaration was filed on the 11th of October by the string being put through it, at 3.40. On the 12th, on my attendance at the office, the second declaration was shewn to me. I was informed by my clerk that the solicitor would see me upon it. He came in shortly afterwards. As he was only an agent, I suggested that he should communicate with the gentlemen who instructed him, that there was already a declaration upon the file. He took the second declaration away with him. On Monday, the 14th, he attended with the same document and the authority. He requested me to file that document with the authority. I filed the second document and the authority between 10.30 and 11 o'clock on the 14th. I believe that the string was put through with my own hand. I declined to take the first declaration off the file without an order of the court. Documents which are not required to be filed are left, and sometimes are without the string being put through them. Only such documents as a declaration of insolvency would be filed at once by being attached to the file with the string passed through it. That is the invariable rule in the office.

On cross-examination this witness said: I attend particularly to the bankruptcy business; but the clerk attends as well. If no question arises upon a document, it would be filed in my absence: the clerk would file it. I believe I put the second declaration upon the file in the presence of Gaches. I received the second

declaration either from Gaches or my clerk on Monday, the 14th. I considered the second declaration was left subject to be submitted to me for my direction. I considered that it was regular to return the second declaration on the Saturday, it being left for a temporary purpose.

The seizure took place at 9.45 on Monday, the 14th of October. The adjudication was on the 16th of October; and the appointment of the plaintiff as trustee took place on the 4th of November.

For the defendant, it was contended that the second declaration was not "filed" pursuant to the 16th of the Rules of Procedure of 1869, until the string or tape by which documents are attached to the file was passed through it. On the other hand, it was contended that the solicitor had fulfilled his duty when he delivered the declaration to the clerk in the office with the intention that it should be then and there filed, and that what took place afterwards was wholly immaterial.

A verdict was, by consent, entered for the defendant, with leave to the plaintiff to move to enter the verdict for him if the Court should be of opinion that the document was filed on the 12th of October.

O'Malley, Q.C., in Easter Term last, obtained a rule nisi.

June 19. *Metcalfe, Q.C.*, and *Purcell* shewed cause. The declaration of inability to pay was not filed in time to frustrate the defendants' execution. One of the acts of bankruptcy provided for by s. 6 of the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, is (subs. 4), "That the debtor has filed in the prescribed manner in the Court a declaration admitting his inability to pay his debts;" and the "prescribed manner" is as follows:—"A declaration by a debtor admitting his inability to pay his debts shall be dated, signed, and witnessed according to the form in the schedule, and shall be filed in the London Bankruptcy Court, if the debtor shall reside or carry on business within the district of that Court; and, where the debtor neither resides nor carries on business within the district of that Court, it shall be filed in the court within the district of which the debtor resides or carries on business:" Rule 16 of the Rules of Procedure, 1869. The 9th rule provides that "all proceedings of the Court shall remain of record in the Court, so as to

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form a complete record of each matter, and they shall not be removed for any purpose, except for the use of the officers of the Court, or by special direction of the judge or registrar," &c. There is nothing either in the Act or in the rules to shew distinctly what "filing" means. It is not contended that, to constitute a filing, the string or tape must be actually put through the document: it may be conceded that the act of filing is complete when the document is finally and absolutely delivered to the proper officer, with the intent that it shall be filed, and it is received by the officer with the intention of filing it. The whole evidence here shews that there was no filing of the second declaration until after the authority to withdraw the first was delivered to the registrar, viz. on Monday, the 14th, at 10.30.

O'Malley, Q.C., in support of the rule. To file is said by Richardson to be, "to put upon a file, thread, string, or wire, or other similar substance; to pass such file through anything." Johnson has a similar definition. Webster defines it thus:—"To string, to fasten, as papers, on a line or wire, for preservation;" and he gives for example, "Declarations and affidavits must be *filed*; an original writ may be *filed* after judgment." He goes on further, "To arrange or insert in a bundle, as papers, indorsing the title on each paper. *This is now the more common mode of filing papers in public and private offices.*" The old mode of filing common bail was by delivering what was called a bail-piece to the proper officer: Tidd's Practice, 9th ed. 240. Our common experience is that affidavits, whether used in Court or at chambers, are filed by the mere act of delivery to the officer of the Court or the judge's clerk; and they are afterwards tied up in bundles for convenience of reference. The second declaration here was filed the moment it was delivered by Gaches to the clerk at the registrar's office with the intention of its being filed. The act of the registrar in subsequently delivering the document back to the solicitor was irregular, and cannot alter the character of the transaction so as to affect the rights of the trustee and the creditors. If the intention of the registrar or his clerk could in any way qualify the act of the person who delivered the document to be filed, that should have gone to the jury. Besides, the debtor is the person who files the declaration of insolvency: the moment he has caused it to be

left at the office, he has done all he can do to make a perfect act of bankruptcy. And when Gaches had delivered the document to the registrar's clerk, he had done all that he was intrusted to do; he had no authority to take it away again. The original indorsement shews that the clerk's first and correct impression was that the filing took place on the 12th of October. (1)

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Cur. adv. vult.

June 20. The judgment of the Court (Keating, Brett, and Denman, JJ.) was delivered by

KEATING, J. This case was argued before us yesterday by Mr. Metcalfe and Mr. O'Malley. The rule was, to enter a verdict for the plaintiff, on the ground that the declaration of inability to pay by Stocken and Harris was sufficiently filed on the 12th of October. The question arose upon an issue directed to try whether certain goods which had been seized by the sheriff under an execution at the suit of the defendant were at the time of seizure the property of the plaintiff as trustee in bankruptcy of Stocken and Harris; and, in order to determine that question, it became neces-

(1) In *Rex v. Wade*, 1 B. & Ad. 861, it was held that the rules of a friendly society are filed within the meaning of 33 Geo. 3, c. 54, when they are placed in the hands of the clerk of the peace.

So, in *Garlick v. Sangster*, 9 Bing. 46, it was held that an insolvent's petition could not be said to have been filed until it had reached its place of final custody. In that case, in order to defeat an execution, the act of bankruptcy relied on was the filing of a petition in the Insolvent Debtors Court. The bankruptcy took place on the 16th of October, but the sale (which was then the dividing line) was not completed until 12 at noon of the 29th. The petition was signed by the insolvent, in prison, on the 28th, after 4 o'clock in the afternoon, and then delivered to Mr. Dance, the official assignee of the court. Mr. Dance, who

was called to prove the fact, could not state when the petition was actually filed: but he stated that he took it to the office at 2 o'clock on the 29th, but that, according to the practice of the office and the course of his duties, it could not have been attested, numbered, and handed to the officer with whom it should remain, until the 30th. Park, J., said: "Filing means putting in the proper place of deposit, and Dance was not the officer with whom this instrument was to be deposited. So, when affidavits are filed at a judge's chambers, the placing them in the hands of the clerk does not complete the deposit in the place of legal custody, and till they arrive there they are not filed." And Tindal, C. J., said that filing means "arrived at its ultimate destination."

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sary to inquire whether the declaration of inability to pay, the filing of which constituted the act of bankruptcy upon which the adjudication proceeded, was filed on the 12th or the 14th of October, 1872, for, if on the last-mentioned day, it would be too late to defeat the defendant's execution. Now, the statute, by s. 6, subs. 4, makes the filing by a debtor of a declaration admitting his inability to pay his debts, an act of bankruptcy from that moment. It appears from the report of the learned judge who tried the issue that the bankrupts instructed their solicitors to file a declaration, and that their agent took it to the office of the registrar of the county court at Peterborough on Saturday the 12th of October, at 10.30 a.m., and left it with a clerk there. The agent, being told by the clerk that a declaration of insolvency had already been placed upon the file by the same parties (signed by one of them in the name of the firm) which might create a difficulty, returned to the office at 12 o'clock on the same day for the purpose of seeing the registrar. The registrar erroneously considering that there was a difficulty in filing the second declaration, the agent at his suggestion took it away for the purpose of consulting his principals and removing the supposed difficulty, by obtaining an authority to take the first declaration from the file. Having done this, the agent brought back the second declaration on the following Monday, and delivered it to the registrar at about 10.30 a.m. with the required authority.

Upon the whole, we are of opinion that the filing of the second declaration took place on Saturday, the 12th of October. We think that the filing of the declaration contemplated by the statute means the delivery of it by a properly authorized person to the proper officer at the proper office, with intent that it should be filed or placed upon record in the ordinary manner. After considering the evidence, we have come to the conclusion that the declaration was left by Gaches at the office on the Saturday with the intention that it should be then filed; and that he did not abandon that intention although he afterwards took it away in order to remove the obstacle erroneously suggested by the officer. The mistaken notion of the registrar cannot be allowed to frustrate the original intention of the person who brought the document to be filed, which intention was never abandoned. We think there was a com-

plete filing of the declaration of inability to pay by the debtors on the 12th, within the meaning of the Act of Parliament, and the rules, and consequently that this rule must be made absolute.

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Rule absolute.

Attorneys for plaintiff: *Smith, Fawdon, & Low.*

Attorneys for defendant: *Walter Moojen & Son.*

TULLY AND ANOTHER v. TERRY.

July 7.

Shipping—Bill of Lading—"Quantity and Quality unknown."

The defendant chartered the ship *Avoca* to carry a cargo of grain from Ibraila to a port in the United Kingdom for a freight of "7s. per imperial quarter delivered;" and the charterparty provided that, in the event of the cargo or any part thereof being delivered in a damaged or heated condition, the freight should be payable "on the invoice quantity taken on board as per bill of lading, or half-freight upon the damaged or heated portion, at the captain's option." Under this charterparty 1021 kilos. of barley, equal to 2368 imperial quarters, were shipped at Ibraila, and the captain signed a bill of lading with the following words written at the foot, which was proved to be usual in the grain carrying trade,—“Quantity and quality unknown.”

The *Avoca* experienced bad weather on her homeward voyage; and when she arrived at Ramsgate, where the cargo was discharged, it was agreed that 80 quarters of the barley had been damaged by heating; and the master claimed to be paid freight on the invoice quantity taken on board:—

Held, that he was entitled to be so paid, notwithstanding the memorandum at the foot of the bill of lading.

APPEAL from the county court of Kent holden at Ramsgate.

The plaintiffs, the owners of the ship *Avoca*, claimed 36*l.* 8*s.* 11*d.* for the balance of freight due to them from the defendant on 2368 quarters of barley ex *Avoca*, as per bill of lading. The defendant paid 6*l.* into court.

In September, 1872, the *Avoca* was at Ibraila, on the Danube, and Messrs. L. Mendl & Co., merchants at that port, shipped on board her a cargo of barley, for which the master signed a bill of lading expressing that the merchants had shipped on board the *Avoca*, then in the port of Ibraila, and bound for Queenstown or Falmouth for orders, as per charterparty dated Galatz, 2nd September, 1872, kilos 1021, Ibraila measure, Danubian barley, well

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conditioned, to be delivered to the order of Messrs. F. Mendl & Co., of London, on being paid freight as per charterparty. At the foot of the bill of lading was written by the master the words "quantity and quality unknown."

It is almost an invariable custom with grain cargoes for the masters to add those words before their signature to bills of lading for their own protection, where, as in this case, they have not kept account of the cargo shipped.

The charterparty provided that the freight should be "for wheat, 7s. per imperial quarter delivered, together with 14l. gratuity to the master; other grain, if any, in proportion, according to the London Baltic printed rates;" "freight to be paid in cash on unloading and right delivery of the cargo." It also contained the following,—"It is further agreed, that, should the cargo consist of wheat or any other kind of grain, in the event of the cargo or any part thereof being delivered in a damaged or heated condition, the freight shall be payable upon the invoice quantity taken on board as per the bill of lading, or half freight upon the damaged or heated portion, at the captain's option, provided no part of the cargo be thrown overboard or otherwise disposed of on the voyage. The charterer's liability on this charter to cease when the cargo is shipped, provided the same is worth the freight on arrival at port of discharge."

The *Avoca* sailed from Ibraila with the cargo on board, and on her arrival at Falmouth received orders for Ramsgate, to which port she proceeded in due course. No part of the cargo was thrown overboard or otherwise disposed of upon the voyage.

F. Mendl & Co., the consignees mentioned in the bill of lading, are the London house of L. Mendl & Co. The cargo was sold by the consignees upon the London market, and ultimately bought by the defendant at a rate per quarter, cost, freight, and insurance; and the bill of lading was indorsed to him in due course. He also received a copy of the charter and the documents and invoices of the cargo usual upon such a sale.

On the arrival of the *Avoca* at Ramsgate, the defendant presented the indorsed bill of lading, and required delivery of the cargo.

The *Avoca* had experienced bad weather upon the voyage; and

the master had reason to believe that some of the cargo would be heated; and he gave notice to the defendant that he exercised his option in that behalf, and required freight to be paid upon the invoice quantity taken on board as per the bill of lading, according to the provisions contained in the charterparty.

The *Avoca* discharged her cargo at Ramsgate. The cargo was not measured on the delivery thereof, but was weighed by a servant of the defendant. Another meter, who acted on behalf of the sellers of the cargo, was present at the discharge, and measured certain portions of the cargo, to ascertain by an average what was the number of imperial quarters delivered. The latter meter was not called as a witness at the hearing. The master, relying on the provisions of the bill of lading and charterparty, kept no check upon the delivery. About 80 quarters of the cargo were damaged by heat. No suggestion of fraud on the part of the plaintiffs was made by the defendant.

1021 kilos, Ibraila measure, of barley, the quantity described as being shipped on the *Avoca* in the earlier part of the bill of lading, are equivalent to 2368 imperial quarters. The freight and gratuity upon the quantity of barley, under the provisions of the charterparty, amount to 718*l.* 11*s.* 11*d.*

The defendant delivered a freight-account to the master of the *Avoca*, in which he admitted his liability for 688*l.* 3*s.*, being the amount of freight upon what he alleged to be the quantity delivered, to wit, 2266 imperial quarters, at 7*s.* per quarter, less 15 per cent. for barley, with the gratuity stipulated in the charter; and at the trial it was contended that it was open to him to pay freight upon the quantity of barley delivered. No proof was given of what was the quantity of barley delivered by measure, except as above.

Including the sum paid into Court in this action, and after crediting the defendant with all advances, &c., under the charter, the defendant had paid the plaintiffs 688*l.* 3*s.* The plaintiffs claimed the further sum of 30*l.* 8*s.* 11*d.* as due to them to make up the aforesaid amount of 718*l.* 11*s.* 11*d.*, the freight and gratuity upon 2368 quarters, at the rate aforesaid.

The judge decided that the master had, under the circumstances, a right to exercise the option given by the charter, and that the

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plaintiffs were entitled to be paid by the defendant freight upon the invoice quantity of barley taken on board the *Avoca*, as per the bill of lading. But he held that, by reason of the master having added to the bill of lading the words "quantity and quality unknown," the bill of lading ceased to indicate any particular quantity of barley to have been taken on board: and a judgment of nonsuit was entered.

The question for the Court was, whether the nonsuit was right.

May 5. *Gibson*, for the plaintiffs. The clause in the charter-party which gives the master the option of demanding half-freight for the heated portion of the cargo, or full freight according to the invoice quantity taken on board, which was inserted in consequence of the decision of the Court of Exchequer in *Gibson v. Sturge* (1), is a reasonable and convenient stipulation, and is not affected by the memorandum at the foot of the bill of lading, "quantity and quality unknown." The ruling of the county-court judge was therefore wrong. The memorandum does not estop the ship-owner from shewing what was the actual quantity put on board: *Haddow v. Parry* (2); *Jessel v. Bath* (3); *Lebeau v. General Steam Navigation Co.* (4); except so far as the Bill of Lading Act (18 & 19 Vict. c. 111, s. 3) operates in favour of a bonâ fide indorsee.

[HONYMAN, J. As between the ship-owner and a bonâ fide indorsee of the bill of lading for value, the statement of quantity in the bill of lading is only primâ facie evidence. (5)]

Lanyon, contra. The clause in question was inserted for the benefit of the charterer. It was, therefore, competent to him to waive it. The contract is that freight shall be paid at 7s. per imperial quarter delivered. The effect of the words "quantity and quality unknown" is the same as if the statement of quantity in the body of the document had been struck out. The quantity delivered here not having been proved, the nonsuit was right.

Gibson was heard in reply.

Cur. adv. vult.

(1) 10 Ex. 622; 24 L. J. (Ex.) 121.

(2) 3 Taunt. 303.

(3) Law Rep. 2 Ex. 267.

(4) *Ante*, p. 88.

(5) See *Meyer v. Dresser*, 16 C. B. (N.S.) 646; 33 L. J. (C.P.) 289.

(11) June 25 200

June 13. The judgment of the Court (Keating and Honyman, JJ.,) was delivered by

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KEATING, J. This was an action brought in the County Court of Kent, to recover a balance of freight alleged to be due to the plaintiffs, who were owners of the barque *Avoca*, in respect of a cargo of barley shipped at Ibraila in September, 1872. The county court judge nonsuited the plaintiffs, but referred to this Court the question whether such nonsuit was right. The case was heard in Easter Term, before my Brother Honyman and myself.

The *Avoca* was chartered by charterparty dated the 2nd of September, 1872, to ship a cargo of grain at Ibraila, and deliver it at a port in the United Kingdom on being paid freight "7s. per imperial quarter delivered:" and it was provided that, "in the event of the cargo or any part thereof being delivered in a damaged or heated condition, the freight should be payable *"on the invoice quantity taken on board as per bill of lading, or half freight upon the damaged or heated portion, at the captain's option,* provided no part of the cargo be thrown overboard or otherwise disposed of on the voyage."

A cargo of barley was accordingly shipped at Ibraila under bills of lading describing the quantity 1021 kilos, which the captain signed, but, before doing so, he added the memorandum usually added in cases of grain cargoes, "Quantity and quality unknown."

The *Avoca* experienced bad weather on her homeward voyage; and the captain, having reason to believe that some of the cargo would be heated, gave notice on arrival to the defendant, who had become indorsee of the bill of lading, that he claimed to exercise the option given him by the charter, and required payment of freight upon the invoice quantity, as per bill of lading.

The *Avoca* discharged her cargo at Ramsgate. The quantity of barley actually delivered did not clearly appear; but it was agreed that 80 quarters were damaged by heating. There was no suggestion of fraud on the part of the plaintiffs.

The defendant paid into Court a sum calculated upon the quantity he alleged to have been delivered: but the plaintiffs claimed to be paid upon the invoice quantity as per bill of lading, according to the terms of the charterparty.

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The county court judge was of opinion, that, in consequence of the above-mentioned addition by the captain to the bill of lading, that document ceased to indicate any particular invoice quantity of barley to have been taken on board, and nonsuited the plaintiffs. We do not concur in that opinion.

The liability of grain cargoes to heat during the voyage, thereby causing an increase, often considerable, in its bulk, doubtless suggested the insertion in charterparties of the clause referred to, and which is now so common in the case of cargoes shipped from the Danube; the object being to protect the merchant from having to pay full freight on the larger quantity caused by the heating (the freight having, in consequence of the decision in *Gibson v. Sturge* (1), been made payable on the *quantity delivered*); and the provision seems in such cases the more necessary from the fact that those cargoes are so frequently sold as floating cargoes, passing from hand to hand by transfer of the shipping documents or reference to them, so that the arrangement by which it may become unnecessary to ascertain the quantity of the damaged portion of the cargo becomes one of great mercantile convenience; nor do we think this at all affected by the addition made by the captain at the foot of the bill of lading, the object of that memorandum being merely to protect the captain against any mistake that might occur in the invoice quantity in the bill of lading, in case of alleged short delivery, or deterioration not caused by his default.

It was argued, in conformity with the decision of the court below, that the effect of the memorandum was to strike out the invoice quantity from the bill of lading: but we think no such effect can be given to it: and we are fortified in that opinion by the case of *Covas v. Bingham* (2), where, in a contract of sale of a cargo afloat, the quantity stated in the bill of lading was construed to be the quantity to be paid for, notwithstanding a similar memorandum in the bill of lading.

Upon the whole, therefore, we are of opinion that the event having happened by reason of which the captain, according to the terms of the charter, had the right to be paid freight upon the invoice quantity in the bill of lading, he did not lose that right by

(1) 10 Ex. 622; 24 L. J. (Ex.) 121. (2) 2 E. & B. 886; 23 L. J. (Q.B.) 26.

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the addition of the memorandum referred to, and consequently that the plaintiffs are entitled to our judgment.

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We think the costs of the appeal ought to follow the event, and be paid by the defendant.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Mercer & Mercer, for Edwards & Son, Ramsgate.*

Attorneys for defendant: *Hillyer, Fenwick, & Stibbard.*

THE CARMARTHEN AND CARDIGAN RAILWAY COMPANY *v.* THE
MANCHESTER AND MILFORD RAILWAY COMPANY.

June 6.

*Evidence of Payment—Receipt for Money by a Third Party—Res inter Alios—
Cheque—Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 12.*

Under s. 12 of the Railways Clauses Act, 1863, where a railway forms a junction with another railway, the company with whose railway the junction is made is empowered to erect such signals and conveniences incident to the junction, &c., as may be necessary for the prevention of danger to or interference with the traffic at or near the junction; and the expenses of erecting and maintaining such signals, &c., are at the end of each half-year to be repaid by the company making the junction:—

Held, that, to sustain an action for such expenses, proof must be given that they have been actually paid: proof that a liability has been incurred for them is not enough.

To prove payment, the plaintiffs' secretary stated that he, on the 25th of February, sent to the persons who did the work a cheque for the amount of their bill, and got from them by return of post (on the 26th) a receipt; and the cashier of the latter stated that he received the cheque at 9 a.m. on the 26th as payment, and sent a receipt:—

Held (Bovill, C.J., dissenting), that the receipt was admissible, with the other facts, to prove payment on the morning of the 26th of February (the action having been brought on that day), without shewing that the cheque was honored.

THE first count of the declaration stated that, after the making and passing of the Railways Clauses Act, 1863 (1), and of the Manchester and Milford Railway Act, 1865 (2), a junction between the railway of the defendants and interferences with the works of the railway of the plaintiffs necessary or convenient for effecting

(1) 26 & 27 Vict. c. 92.

(2) 28 & 29 Vict. c. cccv.

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the said junction had been made at the cost of the defendants, under the superintendence of the engineer of the plaintiffs; and afterwards, and while the said junction and the said interferences with the works of the railway of the plaintiffs as aforesaid necessary or convenient for effecting the said junction as aforesaid continued to so join and interfere with the railway of the plaintiffs as aforesaid, the plaintiffs from time to time erected and worked and managed such signals and conveniences incident to the junction aforesaid, and appointed such watchmen, switchmen, and other persons as were necessary for the prevention of danger to or interference with the traffic at and near the junction aforesaid; and the plaintiffs were put to and incurred expenses in erecting from time to time, maintaining, working, and managing such signals and conveniences as aforesaid, and the employing such watchmen, switchmen, and other persons, and current expenses incidental to the said junction in and during the half-year ending on the 31st of December, 1872: Averment, that all conditions had been fulfilled, times elapsed, and things happened necessary to entitle the plaintiffs to recover such expenses so incurred as aforesaid, and to be repaid the same by the defendants, and to maintain the action in respect of the breach in that count contained; yet the defendants did not at the end of the said half-year pay the plaintiffs the said amount, but therein made default.

There was also a count for money paid, interest, and accounts stated.

Pleas to the first count:—1. That the plaintiffs did not from time to time, or at any time after the said junction had been so made as in the first count mentioned, erect, work, or manage any signals or conveniences which were incident to the said junction, or appoint any watchmen, switchmen, or other persons necessary for the prevention of danger to or interference with the traffic at or near the junction aforesaid, in manner and form as in the first count alleged.

2. That the plaintiffs were not put to and did not incur the said alleged expenses in and during the said half-year ending the 31st of December, 1872, in manner and form, &c.

3. That the plaintiffs had not at the time of the commencement of the suit paid the said alleged expenses, in manner and form, &c.

To the rest of the declaration the defendants pleaded never indebted and payment. Issue thereon.

The cause was tried before Brett, J., at the sittings at Westminster in Easter Term last. The action was brought to recover 97*l.* 15*s.* 11*d.*, being the amount of the bill of Messrs. Saxby & Farmer, patent railway-signal manufacturers, for work done by them for the plaintiffs at the defendants' junction with their railway at Pencader. The claim arose under the following circumstances:—The Carmarthen and Cardigan railway was until the year 1872 a broad-gauge line in connection with the Great Western railway, and commenced at a point a little to the south of Carmarthen (being its junction with the Great Western railway), and extended northward to a place called Llandyssil, lying on the north-west of Carmarthen towards Cardigan. In the year 1865, the Manchester and Milford Railway Company obtained an Act (1) authorizing them to make certain new railways; and by s. 27 they obtained power to lay down narrow-gauge rails on part of the Carmarthen and Cardigan Railway Company's system; and by s. 28 they obtained power to run over the Carmarthen and Cardigan railway.

The Manchester and Milford Railway Company accordingly laid down at their own expense a third rail on the Carmarthen and Cardigan railway, and made a junction therewith on the principle of Stevens & Son's patent. In the year 1872, the Great Western Railway Company narrow-gauged their line. In consequence of this, and of a new company called the Tivy-Side Railway Company having obtained an Act (2) for making a railway upon the narrow-gauge system from the Llandyssil terminus of the Carmarthen and Cardigan railway to Newcastle Emlyn, it became necessary to narrow-gauge the Carmarthen and Cardigan line, and to take up the fixed points laid down at Pencader station and substitute moveable points. This was accordingly done upon the principle of Saxby & Farmer's patent, and the expense now sought to be recovered was thereby incurred. The action was brought on the 26th of February, 1873.

In order to prove payment of Saxby & Farmer's charge for the work so done, Saxby & Farmer's cashier was called. He said that,

(1) 28 & 29 Vict. c. cccv.

(2) 35 & 36 Vict. c. clxxxvii.

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on the 26th of February, 1873, at 9 a.m., he received from the plaintiffs a cheque for 97*l.* 15*s.* 11*d.*, and sent them a receipt, signed by Farmer, by return of post. The plaintiffs' secretary was then called. He said: I received from Saxby & Farmer an invoice for 97*l.* 15*s.* 11*d.* for the work in question; and on the 25th of February, in pursuance of a resolution of the Board, I sent them a cheque for the amount, and on the 26th I got from them a receipt by return of post.

On the part of the defendants it was objected that the receipt was inadmissible, as being *res inter alios acta*. The learned judge, however, admitted it; and he left it to the jury to say whether the cheque was adopted by Saxby & Farmer as payment when it was received, and whether that was before the writ issued. The jury answered both questions in the affirmative. A verdict was thereupon entered for the plaintiffs for 97*l.* 15*s.* 11*d.*

Morgan Lloyd, Q.C., in Easter Term last, obtained a rule nisi for a new trial, on the ground of the improper reception of the receipt.

June 6. *C. Russell, Q.C.*, and *C. H. Hopwood*, shewed cause. The claim of the plaintiffs in this action is founded upon s. 12 of the Railways Clauses Act, 1863, which enacts that the company or person with whose railway a junction is made, may from time to time erect such signals and conveniences incident to the junction, either on their or his own lands or on the lands of the company making the junction, and may from time to time appoint and remove such watchmen, switchmen, or other persons as may be necessary for the prevention of danger to or interference with the traffic at and near the junction; and that the working and management of such signals and conveniences, wherever situate, shall be under the exclusive regulation of the company or person with whose railway the junction is made; and that "all the expenses of erecting and maintaining those signals and conveniences, and of employing those watchmen, switchmen, and other persons, and all incidental current expenses, shall, at the end of every half-year, be repaid by the company making the junction, and in default thereof may be recovered from them in any Court of competent

jurisdiction." It was enough for the plaintiffs to prove that they had incurred a liability to Saxby & Farmer for the amount they sought to recover: it was not necessary to prove actual payment. But, assuming that it was necessary to prove actual payment, there was abundant evidence to sustain their claim without putting in the receipt. The receipt, however, was properly admitted. It was a fact which, coupled with the other facts proved in the case, went to show that the money had been paid: it was not a mere declaration by a person not a party to the suit. The plaintiffs had employed Saxby & Farmer to do the work; and, the account of their charges having been delivered, the secretary of the plaintiffs' company sent them a cheque for the amount, and got by return of post a receipt. The cashier of Saxby & Farmer proved that he received the cheque as payment, and sent the plaintiffs a receipt accordingly. That was clearly a payment according to the ordinary course of mercantile transactions. The receipt was part of the *res gestæ*.

Morgan Lloyd, Q.C., and *G. Lewis*, in support of the rule. The question to be determined was whether the plaintiffs had paid Saxby & Farmer's claim, and whether they had paid it before the commencement of the action: the amount also was material. The way in which the plaintiffs sought to prove payment was, by shewing that their secretary sent a cheque for 97s. 15s. 11d. to Saxby & Farmer on the 25th of February, and that he got back a receipt by return of post. In the absence of proof that the cheque was duly honored, the receipt was essential to prove the payment. Without it there was no evidence. Upon what ground could the receipt be admissible? If Saxby & Farmer had told some third person that the money had been paid, that clearly would have been no evidence. Does it make any difference that they say it in writing? It was a simple declaration or admission of payment from a third person, for the reception of which there is no authority. In *Taylor on Evidence*, 6th ed. p. 1595, it is laid down as an established principle that, "where evidence has been improperly admitted or rejected at *nisi prius*, the Court will grant a new trial, unless it be clear *beyond all doubt* that the error of the judge could have had no possible effect upon the verdict, in which case they will not enable the defeated party to protract the litigation.

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It may further be stated that the wrongful reception of evidence will not furnish less available ground for a new trial, although the jury accompany their verdict with a distinct and positive statement that they have arrived at it independently of the obnoxious evidence." And for this *Bailey v. Haines* (1) is cited. It is impossible to say here that the finding of the jury was not influenced by the admission of the receipt.

Then it is said that it was not necessary, to entitle the plaintiffs to maintain this action, to prove actual payment. [The Court intimated to the learned counsel that they need not address themselves to this point.]

GROVE, J. I think the receipt simpliciter was not admissible. It was *res inter alios acta*, and mere hearsay evidence. And, if the matter had rested only upon that, I should have thought there should have been a new trial. But I think the receipt was superfluous, and that there was sufficient evidence without it. I cannot doubt that the jury would have found a verdict for the plaintiffs upon the evidence of the two witnesses only. Acting, therefore, upon the principle laid down by the Court of Exchequer in *Crease v. Barrett* (2), the inclination of my opinion is that there should be no new trial, though I confess that I come to this conclusion with considerable doubt.

KEATING, J. I agree with my Brother Grove that there ought to be no new trial in this case. The issue raised was, whether or not the plaintiffs had paid the sum they had incurred for the erection and working of the new signals at Pencader station, which, if paid, they were entitled under the Act to have repaid to them. I agree with Mr. Lloyd that, under the terms of s. 12, it was incumbent on the plaintiffs to prove that they had actually paid the money before they could call upon the defendants to repay it. The question therefore is whether they did prove payment. I think they did, and that upon satisfactory evidence. I entirely agree with my Brother Grove that, if the receipt had been produced for the purpose of making that evidence of payment, *per se*, it would not have

(1) 13 Q. B. 815, 831; 19 L. J. (Q.B.) 73, 83.

(2) 1 C. M. & R. 919, at p. 930.

been admissible ; it would have been a mere declaration or statement of a fact by a person not a party to the suit. But we must take the entire evidence as produced to the jury. The payment to be proved was a payment of 97*l.* 15*s.* 11*d.* to Saxby & Farmer : and, for the purpose of making that payment, it may be taken that the plaintiffs, on the 25th of February, sent Saxby & Farmer a cheque. Before they sent the cheque they had received from Saxby & Farmer a written claim for 97*l.* 15*s.* 11*d.* That claim was proved by evidence which was not objected to. It being proved that a cheque was sent to Saxby & Farmer, their cashier, who was called, said that he received the cheque and sent a receipt by return of post ; and the plaintiffs' secretary proved that he received the receipt so sent. All these were mercantile facts connected with the payment ; it was not necessary to go into the terms of the receipt. I take it that proof that a cheque was sent and received, and a receipt given in return, was evidence of facts and not mere hearsay. No doubt the receipt was put in ; and, if the payment had been sought to be proved by that alone, it would have been open to objection. But it was not so. I think there was abundant evidence for the jury, and there is no ground for complaint.

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BOVILL, C.J. I regret that I feel compelled to differ from my Brothers Keating and Grove. I am opinion that the receipt signed by a third person was no evidence of payment. The most familiar instance of this doctrine arises in the case of principal and surety. It has been held that statements or writings by the principal are evidence against him, but not against a surety upon his collateral undertaking : see *Evans v. Beattie* (1), *Bacon v. Chesney* (2), and *Smith v. Whittingham*. (3) I have had some experience both at the bar and on the bench, and I never heard it doubted that an admission by a principal is not evidence against a surety. The receipt here was offered as evidence of payment, and was so received. It was pressed with that view, and was evidently admitted with that view. And, if it was not legally admissible to prove payment, the defendants are entitled to a new trial. The objection was distinctly taken ; and we cannot disregard it. I

(1) 5 Esp. 26.

(2) 1 Stark. 192.

(3) 6 C. & P. 78.

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agree there was some evidence of payment aliunde, viz. the statements of the plaintiffs' secretary and of Saxby & Farmer's cashier, the one that he sent the cheque, and the other that he received it. But the cheque was not produced, and there was no evidence of the amount. The receipt was produced for the purpose of fixing the amount. Now, it was not enough that there was other evidence of payment. This document was offered for the purpose of completing the other evidence. I think there ought to be a new trial. *Crease v. Barrett* (1) and the other cases of that class, where the Courts have said that they would not grant a new trial because the evidence, though inadmissible, could not have affected the verdict, have no application here. I cannot help regretting that the defendants should have had a chance of a new trial upon a point so utterly beside the merits of the case.

BRETT, J. The question raised was whether the receipt was properly admitted in evidence, and as evidence of payment. But I apprehend it was not offered or received as the sole evidence of payment. It was offered and received as evidence, in conjunction with the other evidence in the case. It was objected that it was *res inter alios acta*. If it had been offered as evidence either of the time or manner of payment, I should have thought it amounted to evidence of an admission only, and therefore was not admissible. It would be no more admissible than a letter to the same effect. It would be an admission by a person not a party to the suit. The fact to be proved here was the payment of a sum of money by the plaintiffs to Saxby & Farmer,—the payment of a certain sum at a certain date, in the ordinary course of a mercantile transaction. Now, a mercantile payment consists of certain facts,—sometimes of the fact of handing the money over. Suppose that were done by persons who are no parties to the suit, and the person who paid and the person who received the money were called to prove those facts: that would be admissible evidence, though *res inter alios*, because the payment is a fact, and the mode of payment is a fact. Then, there are other modes of mercantile payment even more common than the handing over the money; for instance, by giving

(1) 1 C. M. & R. 919.

a cheque and getting a receipt. The two facts constitute the payment. Here, the fact of the sending of the cheque was proved by the person who sent it,—the plaintiffs' secretary,—who was authorized by the plaintiffs to send it. The person who received the cheque,—the cashier of Saxby & Farmer,—was called, and he proved that he received the cheque at nine o'clock on the morning of the 26th of February, and that he received it as payment, and sent the plaintiffs a receipt for the amount by return of post; and the plaintiffs' secretary proved that he received the receipt on that day. If the cheque had been in Court, it would clearly have been evidence of the payment; and in that case the receipt would have been unobjectionable. The person who sent the cheque and the person who sent the receipt having been both called, the evidence of the two facts did not make the receipt the less evidence because the cheque was not produced. Both were facts to prove another material fact, viz. payment. The witnesses who were called being the only parties to the transaction, it seems to me that what they did, and the things they mutually gave, were evidence against all the world. The receipt was not offered or admitted as the sole evidence of payment, but as one of the facts which constituted the proof of the fact of payment.

Rule discharged.]

Attorneys for plaintiffs: *Woodrooffe & Plaskitt.*

Attorney for defendants: *G. E. Spencer.*

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June 19.

THE NOTTINGHAM HIDE, SKIN, AND FAT MARKET COMPANY
(LIMITED) v. JOHN BOTTRILL AND ANOTHER.*Guarantee, Construction of.*

The plaintiffs were in the habit of holding weekly sales of hides, skins, &c., the course of business being that the goods bought at each sale were paid for in the following week. One Dyson, who had for some time bought skins at these sales, on the 29th of December, 1871, bought to the extent of 34*l.* 7*s.* 6*d.* Having heard that Dyson had executed a bill of sale, the plaintiffs declined to deliver the skins unless the defendants would engage to be responsible for the price. This being communicated by Dyson to the defendants, the latter on the 1st of January, 1872, telegraphed to the plaintiffs, "We agree to be answerable for the skins," and on the same day sent them a covering letter, in which, after stating that they had had dealings with Dyson for five years, and had never known anything dishonorable or dishonest in any of his transactions, they wrote, "What you have heard was done to protect him from a dishonest tradesman, and will in no way, we hope, be to the injury of his creditors. Having every confidence in him, he has but to call upon us for a cheque and have it with pleasure for any account he may have with you; and when to the contrary we will write you."

The plaintiffs accordingly sent Dyson the goods, and continued to deal with him down to the 3rd of May, 1872, at which time he was indebted to them in 92*l.* 1*s.* 10*d.*, which he was unable to pay, the defendants, who were the holders of the bill of sale, having seized and sold all his effects under it:—

Held, that the defendants' letter of the 1st of January was a continuing guarantee.

THE first count of the declaration stated, that, in consideration that the plaintiffs would sell and deliver certain goods to W. Dyson on credit, the defendants guaranteed and promised the plaintiffs to be answerable to them for the due payment of the price of the goods, and that the plaintiffs accordingly sold and delivered the goods to Dyson on credit at prices amounting to 34*l.* 7*s.* 6*d.*; and that all things were done and happened, and all times elapsed necessary to entitle the plaintiffs to maintain this action for the breach thereafter mentioned; yet that Dyson had not, nor had the defendants, paid the said 34*l.* 7*s.* 6*d.*, and the same remained due and unpaid to the plaintiffs.

Second count, in consideration that the plaintiffs would from time to time sell and deliver goods to W. Dyson on credit, the defendants guaranteed and promised the plaintiffs to be responsible to them for the due payment of the price of any goods which the

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plaintiffs might from time to time, until the defendants should write to the plaintiffs to revoke the said guarantee, sell on credit and deliver to Dyson; that the plaintiffs afterwards accordingly from time to time, without the defendants having revoked the said guarantee, sold to Dyson on credit and delivered to him divers goods at prices amounting to a large sum, whereof Dyson paid a portion, leaving a balance of 92*l.* 1*s.* 10*d.* due and payable; that all things were done, &c.; yet that Dyson had not paid the said 92*l.* 1*s.* 10*d.*, or any part thereof, nor had the defendants paid the same, and the same remained due and unpaid to the plaintiffs.

Third count, that, before and at the time of making the promise by the defendants thereafter mentioned, Dyson was indebted to the plaintiffs in the amount of 34*l.* 7*s.* 6*d.* for goods sold and delivered by the plaintiffs to him, and thereupon, in consideration that the plaintiffs would from time to time sell and deliver other goods to Dyson on credit, the defendants guaranteed and promised the plaintiffs to be responsible to them for the due payment of the said 34*l.* 7*s.* 6*d.*, and also of the price of any goods which the plaintiffs might from time to time, until the defendants should write to the plaintiffs to revoke the said guarantee, sell and deliver to Dyson; that the plaintiffs afterwards accordingly from time to time, and without the defendants having revoked the said guarantee, sold to Dyson on credit and delivered to him divers goods at prices amounting, together with the said sum of 34*l.* 7*s.* 6*d.*, to a sum whereof Dyson paid a portion, leaving a balance of 92*l.* 1*s.* 10*d.*; that all things were done, &c., yet that Dyson had not paid the 92*l.* 1*s.* 10*d.*, or any part thereof, nor had the defendants paid the same, &c.

Fourth count, that the defendants, in order to induce the plaintiffs to sell and deliver to Dyson certain goods on credit, falsely and fraudulently represented to the plaintiffs that they the defendants had done business with Dyson for five years, and had never known anything dishonorable or dishonest in any of his transactions, and that a certain bill of sale of the estate and effects of Dyson, of which the plaintiffs had heard, and which had theretofore been given by Dyson to the defendants to secure 500*l.*, had been given to protect Dyson from a dishonest tradesman, and would in no way, as the defendants hoped, be to the injury of his creditors;

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whereas, in fact and in truth the defendants then, and within the said five years, had known divers dishonorable and dishonest transactions on the part of Dyson, and the said bill of sale had not been given to protect Dyson from the said supposed dishonest tradesman, as the defendants then well knew, but the same had been given as a security to the defendants exclusive of the said other creditors of Dyson, and the same would be an injury to his other creditors, as the defendants then well knew; and the defendants by so representing as aforesaid induced the plaintiffs to sell and deliver to Dyson the said goods on credit, whereby the plaintiffs lost the said goods and the price thereof, and incurred expenses in endeavouring to recover the same. Claim, 120*l*.

Pleas,—1., to the first three counts, a denial of the promise; 2., to the first and third counts, payment by Dyson before action; 3., to the last count, not guilty. Issue thereon.

The cause was tried before Martin, B., at the last Spring Assizes at Leicester. The facts were as follows :—

The plaintiffs are a limited company carrying on business at Nottingham. The defendants are wool-staplers at Leicester. One William Dyson, a fell-monger, of Shearsley, near Rugby, had for some time prior to December, 1871, attended the plaintiffs' weekly sales at Nottingham and purchased sheep-skins, the course of business being, that the goods purchased at each sale were paid for the following week. Dyson attended a sale on the 29th of that month, and bought skins to the amount of 34*l*. 7*s*. 6*d*. Welbourn, the plaintiffs' manager, having heard reports unfavorable to Dyson, and that he had given a bill of sale, and that the bill of sale was registered, declined to send him the goods he had bought, and wrote to him as follows :—

"From reports we have heard, we feel we should not be doing ourselves justice in sending you the skins bought by you to-day, without an engagement on the part of Messrs. Bottrill & Son to become responsible for their value. We must, therefore, request the favor of a telegram from them (Bottrill & Son) by, say, twelve or one o'clock to-morrow morning, to the above effect, when we will forward the skins."

On the next morning the plaintiffs received a telegram, as follows :—

“From John Bottrill & Son, South-gates, Leicester, to Hide and Skin Company, Nottingham.

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“We agree to be answerable for the skins, with pleasure.
Jan. 1, 1872.”

On the same day the defendants sent the plaintiffs a covering letter, as follows:—

“Leicester, January 1st, 1872.

“Gentlemen,—You would receive our telegram this day in reference to the letter received from you by Mr. Dyson. We beg to say, with respect to Mr. Dyson, we have done business with him for five years, and have never known anything dishonorable or dishonest in any of his transactions.

“What you have heard was done to protect him from a dishonest tradesman, and will in no way, we hope, be to the injury of his creditors. Having every confidence in him, he has but to call upon us for a cheque and have it with pleasure for any account he may have with you; and when to the contrary we will write you. Should you require any further explanation, we shall be most happy to give it.

“John Bottrill & Son.”

To this letter the plaintiffs, through their manager, replied as follows:—

“January 2nd, 1872.

“Gentlemen,—Your letter is quite satisfactory, as was also your telegram, on receipt of which we immediately dispatched the skins. We always thought Mr. Dyson to be what you state.”

The skins so purchased on the 29th of December, 1871, the subject of the first count in the declaration, were duly paid for by Dyson; and the plaintiffs continued their dealings with him down to the 3rd of May, 1872, having supplied him with goods at various times, amounting in the aggregate to 561*l.* 8*s.* 9*d.*, and received payments on account amounting in the whole to 469*l.* 6*s.* 11*d.*,—leaving a balance due of 92*l.* 1*s.* 10*d.*

Having heard unfavorable reports of Dyson, the plaintiffs' manager on the 6th of May, 1872, wrote to the defendants, as follows:—

“Gentlemen,—On the strength of your guarantee as to Mr. W. Dyson, of Shearsley, we last week let him have 60*l.* worth of goods. With the previous balance we have against him, he now owes us

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92*l.* 1*s.* 10*d.* We do not hear good reports of him; but we presume we may regard you as security. When we say we do not hear good reports, we refer only to his pecuniary position."

To this letter the plaintiffs received the following reply :—

"Leicester, May 9th, 1872.

"Gentlemen,—We are surprised to find that you have trusted Dyson to such an extent without security. When we wrote to you, we spoke of the confidence we had in him at that time. On receipt of your letter we went over to see Dyson, and regret to say we found to our surprise that he had been deceiving us as to his position.

"John Bottrill & Son."

On the 8th of May, 1872, the defendants seized the stock in trade and effects of Dyson under the before-mentioned bill of sale, which bore date the 4th of November, 1871. In answer to interrogatories, the defendants admitted that Dyson was on the 1st of January, 1872, indebted to them to the extent of 311*l.* 5*s.* 2*d.*

It was submitted on the part of the defendants that their letter of the 1st of January, 1871, was not a continuing guarantee. The learned Baron asked the defendants' counsel whether that was a question for the jury or for him; and, on being told that it was for him, he said: "Then I think it is as plain a guarantee as could be."

A verdict was thereupon entered for the plaintiffs upon the second and third counts (the first being out of the question), damages 92*l.* 1*s.* 10*d.*, and for the defendants upon the fourth count, the learned Baron telling the jury that there was no evidence in support of that count; and leave was reserved to the defendants to move to enter a nonsuit or a verdict for them on the second and third counts, if the Court should be of opinion that the defendants did not guarantee credits beyond that mentioned in the plaintiffs' letter to Dyson of the 29th of December, 1871.

O'Malley, Q.C., in Hilary Term last, obtained a rule nisi accordingly.

Bulwer, Q.C., for the plaintiffs, obtained a cross-rule calling upon the defendants to shew cause why there should not be a new trial as to the fourth count, on the ground of misdirection.

June 18. *Bulwer, Q.C.*, and *A. K. Lloyd*, shewed cause against the first and supported the second rule. The defendants' letter of the 1st of January, 1872, was clearly a continuing guarantee for any debt arising out of dealings which the plaintiffs might have with Dyson until notice should be given to put an end to it; and, no notice having been given, the defendants are liable for all goods supplied by the plaintiffs to Dyson upon the faith of it. The first part of that letter, taken by itself, might be ambiguous; but, coupled with the expression "when to the contrary we will write you," it plainly means that the defendants will hold themselves bound in respect of all goods supplied by the plaintiffs to Dyson until they gave the plaintiffs notice that they desired to put an end to their responsibility. In no other way could a sensible meaning be given to the whole of the letter, read by the light of the surrounding circumstances.

Then, as to the fourth count, there was abundant evidence of misrepresentation by the defendants as to the character and circumstances of Dyson.

[BRETT, J. If they had believed and acted upon the representations contained in that letter, the plaintiffs would not have needed a guarantee.]

Their reliance upon the guarantee was quite consistent with their belief in the defendants' representations as to Dyson's solvency. They have a good right of action in respect of either, though, if they succeed upon the former, they do not want the latter. The whole, however, is so mixed up together that if there had been any doubt the question should have been submitted to the jury.

June 19. *O'Malley, Q.C.*, and *Merewether*, contra. The construction of the letter is clearly for the Court, and not for the jury. The letter amounts to no more than this,—We believe Dyson to be a respectable man, and, whenever our confidence in his honor and honesty is shaken, we will communicate with you. There is nothing which imports that they will pay any debt which he may contract with the plaintiffs in the course of any future dealings he may have with them. The telegram, it is admitted, was a guarantee for the 34*l.* 7*s.* 6*d.*: the subsequent letter was a mere letter covering the telegram. Suppose the defendants had given Dyson a

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cheque, and he had failed to apply it in payment for goods bought of the plaintiffs, would the defendants have been liable upon this letter? Clearly not. [*M'Iver v. Richardson* (1) was referred to.]

Then, as to the fourth count. It may be conceded that the letter of the 1st of January, 1872, is a representation; and, if written for the purpose of procuring credit from the plaintiffs for Dyson, and the plaintiffs had acted upon it, and the statements contained in it were false to the knowledge of the defendants, that would have been evidence to go to the jury in support of that count. But there was no evidence that Dyson had been guilty of anything dishonest or dishonorable. The plaintiffs knew that there was a bill of sale, and they knew it was registered, though they did not know it was given in favor of the defendants.

[BRETT, J. The non-communication of that fact was at all events a breach of faith. What the defendants afterwards did with the bill of sale was evidence of what they intended from the first.]

THE COURT suggested, and the counsel agreed, that, if judgment was given for the plaintiffs upon the counts on the guarantee, the cross-rule should be abandoned, without costs on either side, provided the defendants should elect not to appeal; but that, in the event of the defendants appealing against the judgment on the first rule, the point of misdirection should be open to the plaintiffs on the argument in the Court of error.

KEATING, J. In this case the plaintiffs declared upon a guarantee given to them by the defendants to secure payment for goods to be supplied to one Dyson, and also for an alleged false representation by the defendants as to the credit and solvency of Dyson. It appeared that the plaintiffs were a company carrying on business at Nottingham, where they held weekly sales of hides, skins, &c., and were in the habit of transacting business with Dyson, the skins bought by him one week being paid for in the following week. On the 29th of December, 1871, Dyson had attended one of these sales, and bought goods to the amount of 3*l.* 7*s.* 6*d.* The plaintiffs' manager, having heard reports un-

(1) 1 M. & S. 557.

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favorable to Dyson, declined to send him the goods without an engagement on the part of the defendants to become responsible for their value. Dyson thereupon communicated with the defendants, telling them, no doubt, all the circumstances, because the defendants, on the 1st of January, 1872, sent the plaintiffs a telegram, agreeing to be answerable for the skins. They also, on the same day, sent the plaintiffs a covering letter, and it is upon that letter that the present question arises. In that letter the defendants refer to the telegram, and say, "We have done business with Dyson for five years, and have never known anything dishonorable or dishonest in any of his transactions." The letter then goes on,—“What you have heard” (referring, doubtless, to the bill of sale,) “was done to protect him from a dishonest tradesman, and will in no way, we hope, be to the injury of his creditors. Having every confidence in him, he has but to call upon us for a cheque and have it with pleasure for any account he may have with you; and when to the contrary, we will write you.” On the part of the plaintiffs, it has been contended that that letter amounts not only to a guarantee for the first transaction referred to, but to a continuing guarantee as to any future transactions of the same kind, until notice to the contrary should be given by the defendants. Further transactions did take place between the plaintiffs and Dyson, which resulted in a debt due from the latter of 92*l.* 1*s.* 10*d.*; and that sum the plaintiffs seek to recover in this action, no notice to put an end to the guarantee having been given. I am of opinion that the plaintiffs are right in that contention.

Each case must, no doubt, depend entirely upon the language used, and the document must be looked at with reference to the special circumstances under which it is given. Now, what did the writers of that letter of the 1st of January mean, and what would the plaintiffs naturally understand from it? The defendants were aware of the state of things between the plaintiffs and Dyson, and sent that letter in order to remove the unfavorable impression the plaintiffs had of Dyson's credit and stability. The letter does not confine itself to the transaction alluded to in the telegram; but it goes on,—“Having every confidence in him, he has but to call upon us for a cheque and have it with pleasure for any account he may

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have with you ; and when to the contrary we will write you." What would any man of business understand by that ? The only reasonable construction of the letter, as it strikes me, is this : Our opinion of Dyson is so high, that we are ready to become sureties for any account for which he may become indebted to you ; and, if we see reason to change our mind, we will let you know. That amounts to a guarantee, and a continuing guarantee. It was calculated to induce the plaintiffs to give credit to a man to whom they would not otherwise have given it.

After the agreement which has been come to between the learned counsel, it is unnecessary to pronounce any judgment as to the fourth count.

My Brother Grove, who had heard much of the argument, desires me to say that he concurs in this opinion, though not perhaps so strongly as I have expressed it.

BRETT, J. The first rule is to enter a nonsuit or a verdict for the defendants on the second and third counts of the declaration, on the ground that the defendants did not guarantee credits beyond that mentioned in the plaintiffs' letter to Dyson of the 29th of December, 1871, or, in other words, that the judge was bound to construe the defendants' letter of the 1st of January, 1872, not to be a guarantee. Now, it seems to me that a contract of guarantee is to be construed, like any other written contract, with reference to the circumstances under which it is entered into. The material circumstances in the present case are these :—Dyson had been a customer of the plaintiffs. His credit was impeached in their eyes by something which had come to their knowledge ; and, as there was a probability of his continuing to do business with them, they naturally wished to have an opinion,—and something more than a mere opinion,—as to his solvency. Dyson having bought a parcel of goods at one of their sales, the plaintiffs' manager wrote to him, stating that, in consequence of reports they had heard, they declined to send him the goods without an engagement on the part of the defendants to become responsible for their value. The fact of their requiring security for that parcel of goods would lead any man of business to infer that they would not supply any future goods without a similar security. Dyson accordingly

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communicates that letter to the defendants, and the defendants at once send a telegram, "We agree to be answerable for the skins;" and they follow that up by a covering letter, both telegram and letter having, as a matter of business, reference to the doubtful commercial character of Dyson in the plaintiffs' estimation, and their hesitation to supply him with goods upon his own personal security only. Now, the telegram was clearly a guarantee only for the first parcel of goods. The letter relates to the same subject of discussion. I agree with my Brother Keating, that in the first part, the letter (so far as this rule is concerned) does no more than confirm the telegram; but it goes on to state something which the defendants were not asked in terms to do. It must, however, have been present to their minds, whether they would not do more than satisfy the plaintiffs with respect to the first parcel of goods. The letter is, no doubt, very inartificially expressed; but it must, if possible, have some business sense given to it. The material words are, "Having every confidence in him [Dyson], he has but to call upon us for a cheque and have it with pleasure for any account he may have with you." It seems to me that those words necessarily import an engagement on the part of the defendants to pay for any goods supplied to Dyson, in the event of his failing to pay for them. If so, that is in terms a guarantee. The subsequent words, "and when to the contrary we will write you," seem to me to confirm that interpretation, and to shew that it was intended to be a continuing guarantee. No notice to determine the defendants' responsibility having been given, I think there is no ground for entering a nonsuit. If men of business will use words which are ambiguous, and which are reasonably calculated to induce others to act upon them to their detriment, they must be held responsible for the consequences.

It is unnecessary to express any opinion upon the cross-rule.

Rule discharged. (1)

Attorneys for plaintiffs: *J. L. P. Eyre & Co., for W. D. Heath, Nottingham.*

Attorneys for defendants: *Vizard, Crowder, & Co., for H. A. Owston, Leicester.*

(1) The rule was drawn up with the special reservation agreed upon.

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June 20.CUBITT *v.* LADY CAROLINE MAXSE.*Public Highway, Creation of—User by the Public—Inclosure Act—Award setting out Public Roads.*

An Act passed in 1802 for inclosing a portion of Effingham Common. In 1808, the commissioner appointed to carry the Act into execution made an award whereby and by the map deposited therewith a public road 40 feet wide was directed to be made from A. to B. This road was accordingly set out, and was duly fenced by the allottees of the land adjoining it; but it was never formed and completed so as to satisfy the requirements of ss. 8 and 9 of the General Inclosure Act, 41 Geo. 3, c. 109, and to become a highway repairable by the parish; and there was no evidence that it had ever been used except by the owners or tenants of the allotments on the side of it, and in two or three instances by other persons shortly after it was so set out. About the year 1822, S., who was the lord of the manor of Effingham East Court, and who had purchased some allotments abutting on a portion of the road, planted along the whole length of it, about 9 or 10 feet from the fence separating it from Rammore Common, a row of fir-trees, and the rest of the 40 feet was overgrown with briars, brambles, and furze. The plaintiff in 1852 became the owner of an estate abutting on the other portion of the road, and had for more than twenty years exercised repeated acts of ownership over the whole of the 40-foot space, such as, shooting over it, cutting down some of the fir-trees when they wanted thinning, and repairing the fences; though these it appeared had occasionally been repaired by other persons, to prevent sheep and cattle from straying on to their lands from the adjoining common. The defendant, in 1869, purchased the estate which had formerly belonged to S.; and in 1870 she cut down and converted several of the trees growing upon the 40-foot space opposite the plaintiff's land; and to an action against her for this alleged trespass she pleaded (amongst other pleas) that the locus in quo was a common and public highway for all the Queen's subjects, and justified the cutting down and removing the trees in the exercise of such right of way.

Neither in the conveyance to the plaintiff, nor in that to the defendant, nor in the respective plans thereto annexed, was any mention made of the 40-foot road.

The jury found that the defendant did the acts complained of in assertion of a claim of property, and not of a right of way; that the 40-foot road was never taken to as a public highway by the public; and that the plaintiff had had twenty years' uninterrupted possession of the locus in quo:—

Held, that the evidence did not support the plea.

TRESPASS, for breaking and entering the plaintiff's land in the parish of Effingham, and digging up and taking away the plaintiff's trees and shrubs then growing upon the land, and carrying away the soil, and obstructing the plaintiff in the enjoyment and use of the same, and destroying fences, &c.

Second count, for the conversion of the plaintiff's trees, shrubs, &c.

Pleas, 1. Not guilty: 2. That the land was not the plaintiff's: 3. To the first count, that, at the time of the alleged trespasses, there was of right and ought to have been a common and public highway over the said land for all persons to go and return on foot and with horses and carriages, at all times of the year, at their free will and pleasure; that the defendant had occasion to use the way; and that, because the trees, &c., were growing upon the highway and obstructing the defendant from passing along the same, she necessarily dug up the trees, for the purpose of using the highway, &c.

Issue, and new assignment for trespasses in excess of the alleged right, and for other purposes. Plea, not guilty. Issue thereon.

The cause was tried before Cockburn, C.J., at the last Spring Assizes at Kingston. The facts were as follows:—

In 1802 an Act of Parliament (42 Geo. 3, c. 76) passed for inclosing that part of Effingham Upper Common which lay in the manor of Effingham East Court. A commissioner was appointed, who was to allot certain portions of the lands to be inclosed to persons who had rights of common or other rights therein, and to set out by his award such roads as he might deem expedient either as private occupation roads or as public highways. By his award, which was made in 1808, and the map accompanying it, he set out as a public highway a strip 40 feet wide, extending from a place called Pickett's Hole Corner to another place called Rider's Corner, and directed that the several allottees of the lands should fence the road from their respective allotments, and also from Ranmore Common, along the side of which the road ran. Fences were put up in pursuance of the award; but the road was never metalled or completely formed, nor was it ever used except in the limited manner hereinafter mentioned. The portion of this road opposite the plaintiff's land, called Stoney Rock Farm, was the land upon which the alleged trespasses were committed.

The plaintiff claimed under a conveyance from one Hall, dated in 1852; the defendant under a conveyance from Colonel Stringer, dated in 1869: but in neither conveyance, nor in the plans annexed thereto respectively, was there any specific mention of or

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reference to the strip of land in question. The defendant, however, insisted that it formed part of the soil of the manor. The fir-trees (which formed a continuous line from one end of the road to the other at a distance of nine or ten feet from the fence adjoining Ranmore Common,) were planted by the father of Colonel Stringer in the year 1822, probably under an impression that he, as lord of the manor of Effingham East Court, was owner of the soil, the setting out of the road never having been followed up by any substantial user of it as a public road; but it did not appear that he had done any other act to assert a claim of ownership.

The person from whom the plaintiff acquired his estate and the father of Colonel Stringer had bought up all the allotments abutting upon that part of the road which lay opposite to their respective lands, with the exception of one, which had been allotted to the incumbent of the parish, but the locality of which was not precisely known. For this allotment, which was called "the parson's acre," or "the loose acre," the Stringers had paid the clergyman a rent of 30s. a year.

Colonel Stringer and his tenants, who had occupied under him, from 1849 to 1870, a farm called Effingham Hill Lodge Farm, which adjoined Stoney Rock Farm, stated that they never knew of the strip of land in question being used as a public road. Other witnesses proved that the road had occasionally, but at a very remote period, been used for the purpose of carting farming implements to Stoney Rock Farm, the tenant of which had a field at the end of the road near Pickett's Hole Corner, and also by a baker's cart going from Dorking to a cottage called Bixley's Cottage on the Effingham Road, and once (about fifty years ago) to convey a waggon-load of corn from Effingham to Dorking,—an experiment which from the way being overgrown with bushes and brambles was found too inconvenient to be repeated.

It was also proved that the fences which separated the alleged road from the adjoining lands and from Ranmore Common had been occasionally repaired by the plaintiff, and also by Colonel Stringer's tenants, and by other persons, as they found it necessary, to prevent sheep or cattle from straying from Ranmore Common on to their respective lands; that the plaintiff had shot rabbits on the spot in question; that Colonel Stringer had likewise

done so with his permission; that fir-trees had been cut there by the plaintiff for the purpose of thinning the belt; and that, upon one occasion, when Colonel Stringer had cut down some trees opposite Stoney Rock Farm for repairing fences, he yielded to the plaintiff's claim to the trees when cut.

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The defendant, acting under a belief (as was manifest from a long correspondence which was put in) that the soil of the road had passed to her under the conveyance from Colonel Stringer, cut down about fifty of the fir-trees which were growing upon that part of it which abutted on the plaintiff's land.

In his summing-up, the Lord Chief Justice told the jury that it mattered not whether the soil of the road remained in the lord of the manor or was divested out of him by the Act of Parliament and the award (1); that it was clear that the award did not vest it in the persons whose respective allotments abutted upon it; and, therefore, that any right which the plaintiff might have in it must have been acquired by twenty years' uninterrupted possession under the Prescription Act, 2 & 3 Wm. 4, c. 71,—the word "possession" being understood to mean such a possession as the thing is susceptible of.

After adverting to the evidence as to the user of the way in question, his Lordship said: "I shall hold for the purposes of to-day that it did not become a public highway, and that therefore Lady Caroline Maxse, as one of the public, was not entitled to use it. But then there will still be another question as to the alleged right of way, upon which I must ask your decision. Assuming this to be a public highway, did Lady Caroline Maxse cut down these trees in the assertion of any right of way, or did she cut them down in the assertion of a claim of property? Because I am of opinion,—though I will reserve that point if it is desired,—that, if she cut down these trees in the assertion of a claim of property, she cannot afterwards set up as a defence that she did it for the purpose of asserting a right of way. Now, was it in assertion of a right of way? If Lady Caroline Maxse had cut down her own trees as well as the trees of Mr. Cubitt, the inference might very fairly have been drawn that she cut them

(1) As to how far the lord's rights are affected by an award under an Inclosure Act, see *Sowerby v. Smith*, ante, p. 514, and the cases there cited.

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down for the purpose of restoring the ancient way and giving the public the benefit of it; but she stayed her hand when she got to the end of Mr. Cubitt's land. Moreover, those trees had been growing there for full half a century; and I cannot help thinking that, if it had been thought desirable to go along that way, there would have been still room enough in the remainder of the 40 feet for the exercise of any such right of way as would be necessary. But, without dwelling on this part of the case, the whole tenor of the correspondence seems to me to point to this, that it was a right of property that Lady Caroline Maxse was asserting, and not the question of the road, although that is taken up afterwards."

His Lordship then left the following questions to the jury,—

1. Had Mr. Cubitt and his predecessors in title possession of the strip in question for twenty years prior to the alleged trespass of cutting down the fir-trees by the defendant, taking the term "possession" in the acceptation and according to the signification already intimated? If not, had Mr. Cubitt possession of it at the time of such alleged trespass, taking the term "possession" in the same acceptation. 2. Was the 40-foot road laid out under the award ever taken to as a highway by the public? 3. Were the trees cut down by the defendant for the purpose of using the highway as alleged in the third plea, or in assertion of a right of property?

The jury answered,—We are unanimously of opinion that Mr. Cubitt was in possession of the strip in question for twenty years prior to the alleged trespass of cutting down the fir-trees by the defendant. We are also agreed that Mr. Cubitt had possession of it at the time of such alleged trespass. We are also agreed that the 40-foot road was never taken to as a public highway; and we also believe that the fir-trees were cut down in assertion of a right of property, and not in assertion of a right of way.

His Lordship thereupon directed a verdict to be entered for the plaintiff for 40s., certifying for costs, &c.; reserving leave to the defendant to move on any ground of law not inconsistent with the facts or findings of the jury.

Montagu Chambers, Q.C., in Easter Term last obtained a rule to enter a verdict for the defendant on the third plea, on the ground

that, the locus in quo having been set out as a highway by the inclosure commissioner, the public could not be ousted of their rights by non-user.

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June 20. *J. Brown, Q.C.*, and *Lumley Smith*, shewed cause. The direction of the learned judge as to the third plea was clearly right. Notwithstanding the award, the road never having been completely formed or adopted as a road by the public, the jury were warranted in presuming that, if it had ever been a public highway, it had been legally stopped up. The commissioner set out the 40-foot road for the benefit of the public. If the public did not choose to avail themselves of it, they may be assumed to have abandoned it. A man cannot have an estate put upon him against his will: *Townson v. Tickell* (1); *Doe d. Chidgey v. Harris*. (2)

[KEATING, J. A man cannot, by a mere dedication of a way to the public, charge the public with the repair of it. But the difficulty here is as to who has power, where a road has been laid out by a competent authority, to disclaim on behalf of the public.

GROVE, J. I think it has been held that a dedication once made cannot be revoked.

By the General Inclosure Act, 41 Geo. 3, c. 109, s. 8, the commissioners, before proceeding to make any allotments, are to set out and appoint the public carriage roads and highways over the lands intended to be allotted and inclosed, and to ascertain the same by marks and bounds, and to prepare a map in which such "intended roads" shall be accurately laid down and described, and to cause the same, being signed by the commissioners, to be deposited with their clerk, for the inspection of all persons concerned; and, as soon as may be after such carriage roads shall have been so set out and such map so deposited, the commissioners are to give notice in some newspaper to be named, &c., and also by affixing the same upon the church door of the parish in which any of the lands so to be inclosed shall lie, of their having set out such roads and deposited such map, and also of the general lines of such intended carriage roads, and to appoint a meeting at which it should and might be lawful for any person who might be injured

(1) 3 B. & Ald. 31.

(2) 16 M. & W. 517.

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or aggrieved by the setting out of such roads to attend; and then the commissioners are finally to direct how such carriage roads shall be set out, &c. Then s. 9 contains provisions for fencing and completing the formation of the roads when set out. There was no evidence here that any notice was given or any meeting held.

[KEATING, J. The award and map being produced from the proper custody, must we not presume that all the requisite preliminary steps were duly taken? Besides, the plaintiff's predecessor took an allotment under the award.]

All necessary preliminaries must be proved before a liability to repair the road can be cast upon the parish: *Rex v. Haslingfield* (1); *Rex v. Hatfield*. (2)

[KEATING, J. That is not the question here. You are seeking to make the defendant a trespasser.]

No doubt, a road dedicated to and used by the public may be a highway, although the requirements of 5 & 6 Wm. 4, c. 50, s. 23, have not been complied with so as to make it repairable by the parish: *Roberts v. Hunt* (3), cited in the notes to *Dovaston v. Payne*. (4) The defendant being shewn to have committed the alleged trespass, not in assertion of a right of way, but in assertion of a claim of property, the plaintiff was entitled to recover upon the issue on the new assignment: *Dimes v. Petley* (5); *Bateman v. Bluck*. (6) There was abundant evidence that the defendant might have used the way without cutting down the trees. No case is to be found where a road has been held to be a public highway without evidence of substantial user by the public.

Biron (*Montagu Chambers, Q.C.*, with him), in support of the rule. The award having been received without objection, it must be presumed that all the necessary steps were taken by the commissioner to make it a valid award under the Act of Parliament. The question is not whether the road set out was one which the parish was bound to repair, but whether by force of the award and what was done under the award this 40-foot road was not ipso facto a common and public highway. In the case of a dedication by a private owner, it may be that user by the public is essential

(1) 2 M. & S. 558.

(2) 4 A. & E. 156.

(3) 15 Q. B. 17.

(4) 2 Sm. L. C. 6th ed. p. 148.

(5) 15 Q. B. 276.

(6) 18 Q. B. 870; 21 L. J. (Q.B.) 406.

to the constituting a road a highway; but this was a statutory highway, which needs no evidence of user or adoption by the public. At the time the award was made there were several persons who were interested in the setting out of this road; and the slight evidence of user of it by the public may be accounted for by the fact that all the adjoining allotments had got into the possession of Mr. Stringer and the plaintiff's predecessor, to whom a public road in that direction was unimportant. (1) In the notes to *Dovaston v. Payne* (2), it is said: "The sort of dedication which shall suffice to entitle the public to a road is different from that which must take place in order to burthen the parish with the duty of repairing it: See *Rex v. Leake* (3), *Rex v. Cumberworth* (4), *Rex v. Wright* (5), *Rex v. Mellor* (6), *Grand Surrey Canal Company v. Hall* (7): and accordingly, in *Roberts v. Hunt* (8), it was held that a road dedicated to and used by the public was still a public highway, although the requirements of the 23rd section of the statute (5 & 6 Wm. 4, c. 50) had not been complied with so as to make it repairable by the parish."

[KEATING, J. Do you find any case of a public highway, before the General Highway Act, which nobody was bound to repair?]

In all parts of the country there are green lanes which nobody is bound to repair. Where the legislature have wished to guard against new roads becoming public roads until they are completely finished and fit to be travelled upon, they have known how to express such an intention: see *Rex v. Justices of Yorkshire*. (9) In *Rex v. Lyon* (10), it was held that, when a way has been recognised as public in an Act of Parliament for making streets, squares, &c., it is not necessary that it should be adopted by the parish to make it a public way. "The Act of Parliament," said Bayley, B., "makes

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(1) The road was set out in anticipation of the probable inclosure of Ranmore Common; in which case it would have formed a direct line of communication to the village of Effingham. And the non-user of it may be accounted for by the fact that it was found more convenient to travel along the edge of Ranmore Common than along a rough and imperfectly formed highway.

- (2) 2 Sm. L. C. 6th ed. p. 147.
 (3) 5 B. & Ad. 469.
 (4) 3 B. & Ad. 108.
 (5) 3 B. & Ad. 683.
 (6) 1 B. & Ad. 32.
 (7) 1 M. & G. 392.
 (8) 15 Q. B. 17.
 (9) 5 B. & Ad. 1003.
 (10) 5 D. & P. 497.

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this a public road, and therefore the adoption by the parish, to make it a public road, is not wanted."

[GROVE, J. In Com. Dig. *Chimin* (A. 4.), it is said that, "if a highway wants repair, the parish of common right ought to repair it."]

Turner v. Ringwood Highway Board (1) is a distinct authority to shew that, where a public road has been once set out under an Inclosure Act, it becomes eo instanti a public highway: and no case is to be found where a highway set out under the authority of an Act of Parliament has ever ceased to be a highway. In *Dawes v. Hawkins* (2) Byles, J., treats it as an established maxim that "once a highway always a highway;" "for," he says, "the public cannot release their rights; and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are, either by the old writ of ad quod damnum or by proceedings before magistrates under the statute."

KEATING, J. This case has been extremely well argued on both sides; but, after all the research of the learned counsel, they have been compelled to admit that there is a complete dearth of authority upon the point which we are called upon to decide. The rule is, to enter a verdict for the defendant upon the third plea. Now, that plea, which is pleaded to a count which charges the defendant with breaking and entering the plaintiff's land, and digging up and taking away trees and shrubs, is, that the locus in quo was a common and public highway, and that the defendant, in the assertion of her right as one of the public to use the way, dug up and removed the trees, &c., which obstructed it. The Lord Chief Justice, at the trial, put certain questions to the jury, one of which was whether the road (which had been set out by a commissioner under an Inclosure Act) was ever taken to by the public; and another, whether the trees, &c., were cut down by the defendant for the purpose of using the way as alleged, or in assertion of a right of property; and the third was, whether the plaintiff had had twenty years' possession of the locus in quo. Upon the answers given by the jury to these questions, the Lord Chief Justice directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move upon any ground of law not inconsistent with the facts or findings of the jury.

(1) Law Rep. 9 Eq. 418.

(2) 8 C. B. (N.S.) 848, at p. 858; 29 L. J. (C.P.) 343.

I am of opinion that the rule to enter a verdict for the defendant must be discharged. The defendant, having, to justify her acts, pleaded the existence of a common and public highway, was bound to prove that the locus in quo was a common highway. User by the public was expressly negatived by the finding of the jury. At all events, no user by the public was proved. If there was no user to sustain the plea, the defendant was driven to establish the existence of a common highway by virtue of the Act of Parliament. That was an Act passed in 1802, for inclosing that part of Effingham Upper Common which lay in the manor of Effingham East Court. It appears that a commissioner was appointed under the Act, who, by his award made in 1808, and a map accompanying it, set out a road of the width of 40 feet from a place called Pickett's Hole Corner, to a place called Rider's Corner, including the locus in quo: and, if the mere act of the commissioner in so setting it out by his award did constitute that road a public highway, the defendant would have made out her third plea. But it appears to me that that alone does not constitute a highway within the meaning of the local Act, read by the light of the General Inclosure Act, 41 Geo. 3, c. 109. The commissioner is to ascertain and set out the line of the intended roads under the local Act, and, that being done, a surveyor is to be appointed, who is to form and complete the road. Until that has been done, no liability to repair the road is cast upon the parish. The object of the general Act was that the roads set out should not be highways repairable by the parish until they had been formed and completed under the direction of the surveyor. Assuming that to be so, it is said that it may still have been the intention of the legislature that a road so set out should be a highway, though the parish might be under no liability to repair it. I do not assent to that argument. I take the intention of the legislature to have been, that the moment a way was ascertained to be a highway, it became repairable by the parish as at common law: and, when the Act of Parliament says that the road shall not be repairable by the parish until certain preliminaries are gone through, it appears to me that it was not intended that it should be a highway until all these were done. There being, then, no ground for the claim of a highway by user amounting to a dedication to the public, and, in the view I take as

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to the construction of the Act, no intention on the part of the legislature that the road set out should become a public highway until it was completely formed, in accordance with ss. 8 and 9 of the 41 Geo. 3, c. 109, I think this rule should be discharged.

BRETT, J. The substantial question raised at the trial and upon the motion was, whether the Lord Chief Justice was not bound to direct the jury that the plea was proved, that is, that the 40-foot road set out under the award of the commissioner was a common and public highway. The facts are these:—In 1802 an Act was passed for inclosing a certain portion of Effingham Common; and it must be presumed that everything was done to entitle the commissioner to make an award. He did make an award in 1808, and by that award and the accompanying map he set out a road which was to be a highway, and which was properly set out by metes and bounds on the land, and fenced. But there was no evidence that anything more was done to the road,—no evidence that it was ever completed or even formed more than by setting it out by metes and bounds, and fencing it. Then there was abundant upon the evidence to justify the finding of the jury that the road was never taken to as a public highway. Upon that state of facts, the question is whether the Lord Chief Justice was bound to hold as matter of law that the road in question was a public highway. According to the authorities collected in the notes to *Dovaston v. Payne* (1), it seems that there are two ways by which a highway may be created. One is by dedication. “Except,” it is said, “where this is done by the express enactment of the legislature, it derives its existence from a dedication to the public by the owner of the land over which the highway extends of a right of passage over it; and this dedication, though it be not made in express terms, as it indeed seldom is, may and will be presumed from an uninterrupted use by the public of the right of way claimed.” That a mere dedication by the owner of the soil will not create a highway is clear. Blackburn, J., in delivering the judgment of the Court of Queen’s Bench in *Fisher v. Prowse* (2), says: “It is of course not obligatory on the owner of land to dedicate the use of it as a high-

(1) 2 Sm. L. C. C. 6th ed. at p. 140.

(2) 2 B. & S. 770, at p. 780; 31 L. J. (Q.B.) 212. *8 Sm. N.S. 1208*

way to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them." Acceptance by the public is ordinarily proved by user by the public; and user by the public is also evidence of dedication by the owner. Both dedication by the owner and user by the public must concur to create a road otherwise than by statute. The other way in which a road may be created, is by statute. In the notes in 2 Smith's Leading Cases, 6th ed. at p. 144, it is said: "It has been already remarked that a highway is sometimes created by Act of Parliament passed for that purpose. The provisions of such an Act must be strictly followed, or the creation will not take place." That seems to me to shew that, in order to prove a public way created by Act of Parliament, it is necessary to shew that the provisions of the Act have been strictly followed. The cases cited in support of the proposition are, *Rex v. Cumberworth* (1) and *Rex v. Edge Lane*. (2) In those cases the Act of Parliament authorized the making of a road, in the one from A. to C., in the other from A. to B. with a branch road to C., and it was held that the road did not become a highway repairable by the parish until the entire road and branch were completely formed. In the last-mentioned case the Court relied very much on the remarks made by Lord Eldon in *Blakemore v. Glamorganshire Canal Navigation*. (3) "When," says that learned judge, "I look upon these Acts of Parliament, I regard them all in the light of contracts made by the legislature on behalf of every person interested in anything to be done under them; and I have no hesitation in asserting that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under our constitution." The persons here interested are the local public, whose interest it is that the road should be completed strictly in accordance with the Act of Parliament before it is put upon them as a highway. Applying that here, the commissioner, acting under the local Act and the general Act, was bound to carry out the enactments in s. 8 of the General Inclosure Act before the road could become a public highway, or any liability could be

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(1) 3 B. & Ad. 108; 4 Ad. & E. 731.

(2) 4 Ad. & E. 723.

(3) 1 My. & K. 162.

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cast upon the parish to repair it. That is all that it is necessary for us to decide here. The language of s. 9 would seem to confirm this view; for, it treats the road as set out and mapped as an intended road. Where, therefore, the intended road has never been taken to by the public, before it can be considered as a common and public highway it must have been completely formed in the manner prescribed by the Act. It may be that, if the public take to a road before it is completed, they cannot afterwards on account of its incompleteness say it is not a highway. That might give rise to a very different question, but one which does not arise here. Let us see if the cases cited by Mr. Biron are inconsistent with this view. The case he mainly relied on was *Turner v. Ringwood Highway Board*. (1) But, looking at the facts of that case, it will be found not to be opposed to our present decision. It was admitted that there was at one time a created road; and there was nothing inconsistent with the supposition that the road had been completely formed; and there had been a user by the public: but it was contended that, inasmuch as only a portion of the width of the road had been metalled, the residue on either side being covered with heath and furze, the rights of the public were limited to the *via trita*, and might be considered as waived or extinguished as to the remaining portion by non-user. But Vice-Chancellor James, referring to the case of *Reg. v. United Kingdom Electric Telegraph Co.* (2), said that, whatever were the rights of the public over the way in 1811, when it was first set out, those were the rights of the public in 1868, when the acts complained of were done. The fact which makes that case applicable here is, that the road, such as it was, had been once completed and used; and the dictum of Byles, J., in *Dawes v. Hawkins* (3) might well apply to such a case. With respect to the case of *Rex v. Lyon* (4), the road there had been recognised as public in an Act of Parliament, and had always been used as a public way. My decision is based upon this, that the alleged road was merely a road set out by the commissioner under the local Inclosure Act, but not completely formed, and not used by the public, and therefore, according to the cases

(1) Law Rep. 9 Eq. 418.

(2) 31 L. J. (M.C.) 166.

45. 1153.

(3) 8 C. B. (N.S.) 848; 29 L. J.

(C.P.) 343.

(4) 5 D. & R. 497.

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cited in the notes to *Dovaston v. Payne* (1), never became a public highway. The defendant, therefore, having failed to prove a compliance with the provisions of the General Inclosure Act, has failed to prove her third plea.

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GROVE, J. I am of the same opinion. It is contended on the part of the defendant, as matter of law, that the setting out by the commissioner on a map or plan annexed to his award of a road, and the staking out of the line of such intended road upon the land, without any other act done or any evidence of user by the public, makes it at once and for all time a public highway, even though it were not traversable at all. That proposition would require very strong words in an Act of Parliament to sustain it. If the special Act and the award are to be considered as a bargain with the public, it seems singular that the public should be bound where the persons with whom they are supposed to contract have not complied with the conditions of the bargain on their part, and so the public do not get the thing they contracted for. The word "roads" in s. 9 of the General Inclosure Act cannot mean anything different from the "intended roads" mentioned in s. 8, which are to be "formed, completed, and repaired" before the parish can be compelled to take to them. Mr. Biron was driven to contend that there might be a highway before the statute which was not repairable by the parish: but Com. Dig. *Chimin* (A. 4) shews that once a highway it is always repairable by the parish. This view is very much supported by the case of *Rex v. Sheffield* (2), which decides that, if the inhabitants of a township bound by prescription to repair the roads within the township be expressly exempted by the provisions of a road Act from the charge of repairing new roads to be made within the township, that charge must necessarily fall upon the rest of the parish. Ashhurst, J., delivering the judgment of the Court, says: "It is an incontrovertible position, that, by the general law of the land, the parish at large is *primâ facie* bound to repair all highways lying within it, unless by prescription they can throw the onus on particular persons by reason of their tenure; but, when that is the case, it is by way of exception to the general rule." That establishes to my mind that,

(1) 2 Sm. L. C. 6th ed. p. 140.

(2) 2 T. R. 106.

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provided a highway be made or declared so by statute, the parish is bound to repair it, if there be no other provision in the Act for its repair. By s. 8 of the General Inclosure Act, 41 Geo. 3, c. 109, provision is made for setting out and appointing public roads and ascertaining the same by metes and bounds, and for laying down and describing them in a map to be signed by the commissioner, and for the publication of notice of such roads having been set out, and of the general lines of such intended roads, and for appointing a meeting at which any person injured or aggrieved may object to the setting out of such roads: and then by s. 9 the commissioner is to appoint a surveyor "for the first forming and completing such parts of the said roads as shall be newly made, and for putting into complete repair such parts of the same as have been previously made;" and it goes on to provide that, "in case such surveyor shall neglect to complete and repair such roads respectively within the space of two years after such award, he shall forfeit the sum of 20*l.*, and the inhabitants at large of the parish, township, or place wherein such roads shall be respectively situate be in no wise charged or chargeable towards forming or repairing the said roads respectively till such time as the same shall by the justices in quarter sessions be declared to be fully and sufficiently formed, completed, and repaired." Then, and not until then, the bargain with the public is completed, and the road becomes a highway. To say that the performance of some only of the essential preliminaries to the making it a highway, even though it be not in a fit state to be used by the public, and is not in fact used by the public, is sufficient to cast the burthen of its repair upon the parish, is not, as it seems to me, warranted by the language of the Act. Therefore, I think the foundation of the defendant's third plea in this case fails, and I agree with the rest of the Court that the rule must be discharged.

Rule discharged.

Attorney for plaintiff: *Hopgood.*

Attorneys for defendant: *Fladgate, Clarke, & Co.*

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that if the person sought to be adjudged a bankrupt do not reside or carry on business within the London Bankruptcy District "the Court" shall mean the county court of the district within which he resides or carries on business.—A bankruptcy petition in the form required by the bankruptcy rules containing, among other necessary allegations, a statement that the debtor did not reside or carry on business in the London District, was presented to the county court of the district in which the debtor resided, accompanied by the usual affidavit of verification required by the rules.—The debtor did not appear on the hearing, and the county court adjudicated him a bankrupt in the usual form.—The debtor did, in point of fact, carry on business within the London district under an assumed name:—*Held* (affirming the decision of the Court below), that the adjudication was not void, notwithstanding that the bankrupt did in fact carry on business in London, but merely irregular, and could only be questioned by proceedings in the way of application or appeal to the Court of Bankruptcy itself.—In order that the 87th section of the Bankruptcy Act, 1869, may be applicable, it is not necessary that the debtor should have been adjudicated bankrupt as a trader, but only that he should be in fact a trader. **REVELL v. BLAKE** - **Ex. Ch. 533**

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to him being void for want of the official mark, without malice or want of reasonable care on the part of the defendant.—If a clerk be appointed by the returning officer to assist at the polling-station, the presiding officer may by the Act depute to such clerk so much of his duties as he thinks fit, with certain specified exceptions. For the acts of commission or omission of the clerk in the performance of the duties so delegated, the presiding officer will not be responsible, inasmuch as he does not appoint the clerk, and the relation of master and servant does not exist between them.—Per Bovill, C.J., and Grove, J. The Act does not impose on the presiding officer the duty of ascertaining, before the voter deposits a voting paper in the ballot box, whether the official mark is on such paper.—Per Keating and Brett, JJ. The statute does impose such duty on the presiding officer. PICKERING *v.* JAMES - 489

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COAL-PLATE IN HIGHWAY—Nuisance—Insecure Coal-plate in a public Footway—Liability to repair—*Metropolis Local Management Act, 1855* (18 & 19 Vict. c. 120), s. 102.] The defendant let premises to a tenant under a lease by which the latter covenanted to keep them in repair. Attached to the house was a coal cellar under the footway, with an aperture covered by an iron plate, which was at the time of the demise out of repair and dangerous. A passer by in consequence fell into the aperture and was injured:—*Held*, that, the obligation to repair being by the lease cast upon the tenant, the landlord was not liable for this accident.—*Held*, also, that the provision in s. 102 of the *Metropolis Local Management Act, 1855* (18 & 19 Vict. c. 120), makes no difference in this respect. PRETTY AND WIFE *v.* BICKMORE 401

COMMENCEMENT OF LAY-DAYS—*Ship and Shipping*—Charterparty—Demurrage—“Load in the usual and customary Manner.”—*Dock Regulations.*] It was agreed by charterparty between plaintiffs and defendants that the plaintiffs' ship should proceed direct to any Liverpool or Birkenhead dock, as ordered by the defendants, and there load in the usual and customary manner a cargo of coals, the vessel to be loaded at the rate of 100 tons per working day. The defendants directed that the ship should proceed to the W. Dock at Liverpool. Cargoes of coal are supplied at the docks at Liverpool through the agency of the agents for various collieries, and are most

COMMENCEMENT OF LAY-DAYS—continued.

usually loaded in the W. Dock from "tips," of which there are only two in the dock, and by the dock regulations no coal agent is permitted to have more than three vessels in the dock at a time. Though coal is generally loaded in the W. Dock from tips, it can be, and not unfrequently is, loaded from lighters. The plaintiffs' ship was ready to go into the dock on the 3rd of July, but was not allowed to enter because the coal agents employed by the defendants to supply the cargo had three vessels already in the dock, and two others in turn to go in. She was allowed to go into the dock on the 11th of July, but could not get under the tips for some time, owing to the number of vessels in turn to go under them before her.—*Held*, in an action for demurrage on the charterparty, that the lay-days did not commence at the time when the ship was ready to enter the dock, as contended by the plaintiffs, nor at the time when she got under the tips, as contended by the defendants, but at the time when she got into the dock.—*Brown v. Johnson* (10 M. & W. 331) followed. TAPSCOTT v. BALFOUR - 46

COMMISSION—Married woman—Acknowledgment—

See ACKNOWLEDGMENT BY MARRIED WOMAN. - 106

COMMITTAL UNDER DEBTORS ACT, 1869—

County Court—Commitment for Disobedience of an Order for Payment of Money—County Court Act, 1846 (9 & 10 Vict. c. 95), ss. 98, 99, 103—*Debtors Act, 1869* (32 & 33 Vict. c. 62), ss. 4, 5—*Prohibition.*] A county court judge, on the 25th of November, 1872, made an order, under s. 5 of the Debtors Act, 1869, for the commitment of a debtor for forty days, for non-payment of debt and costs under a judgment. The debtor was arrested thereunder on the 30th of December, and discharged by a judge of a superior Court on the 6th of January, 1873, on the ground of privilege. The gaoler claiming to retain the warrant for his own protection, and the judge of the county court refusing to issue a second or duplicate warrant, a fresh judgment-summons was taken out, under which a second order of commitment for forty days for the non-payment of the same debt and the additional costs was issued on the 7th of March, 1873 :—*Held*, that the issuing of the second order of commitment pending the first was an excess of jurisdiction, and a prohibition was granted.—*Semble*, per Bovill, C.J., and Brett, J., that the power of a judge of a county court, under ss. 98, 99, and 103 of 9 & 10 Vict. c. 95, to commit more than once for the non-payment of a judgment debt, is virtually superseded by ss. 4 and 5 of the Debtors Act, 1869; and that it is now limited to a single commitment (not to exceed six weeks) for a single default,—each neglect, where the order is for payment by instalments, being deemed to be a fresh default. HORSNAIL v. BRUCE - 378

COMMON IN GROSS—Exclusive Right of Pasturage—Immemorial Exercise of a Right—Presumption of legal Origin—Misdescription in ancient Documents.] The corporation of a borough had from time immemorial exercised, by actual enjoyment by the free burgesses or by way of receipt of rent or acknowledgment, a right of pasturage for all cattle, sheep, and other commonable animals,

COMMON IN GROSS—continued.

levant and couchant within the borough, over lands in the neighbourhood of the borough, during a certain season of the year, and there was no evidence that during such season the owners or occupiers of the lands in question, or any other persons, had exercised the right of pasturage over such lands. The corporation had, from the time of Henry VIII., from time to time exercised the right of releasing for valuable consideration their rights of pasturage over portions of the lands subject thereto, still continuing to exercise their rights over the rest as before, without any resistance thereto upon the ground that the release of the part of the land extinguished the right as to all, which would have been the case with a mere right of common. In the releases and other deeds of conveyance made by the corporation in reference to their rights, they had always been described in terms which would be appropriate to rights of common strictly so called :—*Held* (affirming the decision of the Court below), that according to the principle of law by which a legal origin is, if possible, to be presumed for a long-established practice, it must be presumed that what the corporation was entitled to was "sola vestura," or an exclusive right of pasturage over the lands in question, and not a right of common, which would have been extinguished by a release of part of the land, notwithstanding the description of the right as a right of common in a long series of documents. JOHNSON v. BARNES. [Ex. Ch. 527]

COMMON LAW PROCEDURE ACT, 1852, s. 202

See STAY OF PROCEEDINGS. [29]

—, 1854, ss. 60, 61 - - - - 24

See GARNISHEE ORDER.

COMMON PLEAS AT LANCASTER—Attorney—Jurisdiction—

See STRIKING OFF THE ROLL. - 63

COMPANIES ACT, 1867, s. 38 - - - 528

See PROSPECTUS OF COMPANY.

COMPANY—Director—Warranty of authority 427

See WARRANTY OF AUTHORITY.

— Prospectus—Contract - - - 328

See PROSPECTUS OF COMPANY.

COMPENSATION—Lands Clauses Act Ex. Ch. 191

See COMPENSATION UNDER LANDS CLAUSES ACT.

— Mines—Reservation - - - 336

See RESERVATION OF MINES.

COMPENSATION UNDER LANDS CLAUSES ACT

—(8 & 9 Vict. c. 18), s. 68—*Compensation for Lands injuriously affected—Obstruction of Highway.*] The plaintiff was the occupier, under a lease for a long term, of premises in the City of London, where he carried on the business of a carman and contractor. Adjacent to these premises, but not actually touching them, a public highway being between, was a public draw-dock communicating with the river Thames. The plaintiff had no right or easement to or in the dock other than his right as one of the public, but the plaintiff's premises, by reason of their proximity to the dock, and the access given thereby to and from the river, were rendered more valuable either to sell or occupy, with reference to the uses to which any owner might put them.—*The Metro-*

COMPENSATION UNDER LANDS CLAUSES ACT
—continued.

politan Board of Works, in constructing the Thames Embankment under the powers conferred upon them by the Thames Embankment Act, 1862 (25 & 26 Vict. c. 93), which incorporates the Lands Clauses Consolidation Act, 1845, filled up the dock, and so cut off the access from the river to the public street adjoining the plaintiff's premises, which thereby became, as premises either to sell or occupy in their then state, and with reference to the uses to which any owner or occupier might put them, permanently diminished in value:—*Held* (by Kelly, C.B., Blackburn, J., Archibald, J., and Bramwell, B., Cleasby, B., dissenting, affirming the judgment of the Court below), that the plaintiff's interest in the premises was injuriously affected within the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), s. 68, so as to entitle him to compensation.—*Rickett v. Metropolitan Ry. Co.* (Law Rep. 2 H. L. 175) and *Chamberlain v. West End of London, &c., Ry. Co.* (2 B. & S. 605, 617; 31 L. J. (Q.B.) 201; 32 L. J. (Q.B.) 173) discussed. *McCarthy v. The Metropolitan Board of Works* — **Ex. Ch. 191**

COMPOSITION—Town councillor — **406**
See DISQUALIFICATION OF TOWN COUN-
CILLOR.

CONCEALMENT OF MATERIAL FACT—Insurance on Freight—Warranty as to the Amount of Insurance on the Hull—Non-communication of a material Fact coming to the Knowledge of the Assured after the Acceptance of the Risk.] A proposal for insurance on freight was made and accepted on the 11th of March. On the 16th the ship was lost. On the 17th the assured, with knowledge of the loss, but without communicating it to the insurers, demanded a stamped policy. The insurers then for the first time required to be informed as to the amount of insurance upon the hull, and inserted in the policy (which the assured accepted) the following warranty,—"Hull warranted not insured for more than 2700*l.* after the 20th of March." The vessel was in fact insured for an additional 500*l.* in an insurance club, by the rules of which all ships belonging to members were insured from the 20th of March in one year to the 20th of March in the following year, "and so on from year to year unless ten days' notice to the contrary be given," and in the absence of notice the managers were to "renew each policy on its expiration."—*Held*, that, notwithstanding those rules, regard being had to the stat. 30 & 31 Vict. c. 23, ss. 7—9, the club policy was not a continuing policy beyond the 20th of March of the current year, and that, the ship having been lost before that day, no new effective policy could have been made, and consequently that the warranty was complied with.—*Held* also that, the risk having been accepted by the insurers on the 11th of March, the addition on the 17th of a term for their benefit, and not affecting the risk, did not prevent the policy from being one drawn up in respect of the risk accepted on the 11th, and therefore, upon the authority of *Cory v. Patton* (Law Rep. 7 Q. B. 304), the non-communication of the loss was not a concealment of a material fact so as to avoid the policy. *LISHMAN v. NORTHERN MARITIME INSURANCE CO.* — [216]

CONSIGNEE—Insurable interest — **596**
See INSURABLE INTEREST. 2.

CONSTRUCTION—Statute—Inconsistency — **185**
See INCONSISTENT ENACTMENTS.

CONTAGIOUS DISEASES (ANIMALS) ACT, 1869 (32 & 33 Vict. c. 70), s. 75—*The Animals Order, 1871, s. 19—Neglect to give Notice of Animals' being diseased—Knowledge.*] By the Animals Order, 1871, made by the Privy Council under the 75th section of the Contagious Diseases (Animals) Act, 1869, it is provided that every person having in his possession or under his charge an animal affected with a contagious or infectious disease shall, "with all practicable speed, give notice to a police constable of the fact of the animal being so affected":—*Held*, that in order to convict the person in possession or charge of a diseased animal of an offence against the order, it must be proved that he was aware of the fact that the animal was diseased. *NICHOLS v. HALL* [322]

CONTAGIOUS DISEASE—Animal—Notice **322**
See CONTAGIOUS DISEASES (ANIMALS)
Act, 1869.

CONTINUING GUARANTEE—Construction.] The plaintiffs were in the habit of holding weekly sales of hides, skins, &c., the course of business being that the goods bought at each sale were paid for in the following week. One Dyson, who had for some time bought skins at these sales, on the 29th of December, 1871, bought to the extent of 34*l.* 7*s.* 6*d.* Having heard that Dyson had executed a bill of sale, the plaintiffs declined to deliver the skins unless the defendants would engage to be responsible for the price. This being communicated by Dyson to the defendants, the latter on the 1st of January, 1872, telegraphed to the plaintiffs, "We agree to be answerable for the skins," and on the same day sent them a covering letter, in which, after stating that they had had dealings with Dyson for five years, and had never known anything dishonourable or dishonest in any of his transactions, they wrote, "What you have heard was done to protect him from a dishonest tradesman, and will in no way, we hope, be to the injury of his creditors. Having every confidence in him, he has but to call upon us for a cheque and have it with pleasure for any account he may have with you; and when to the contrary we will write you."—The plaintiffs accordingly sent Dyson the goods, and continued to deal with him down to the 3rd of May, 1872, at which time he was indebted to them in 92*l.* 1*s.* 10*d.*, which he was unable to pay, the defendants, who were the holders of the bill of sale, having seized and sold all his effects under it:—*Held*, that the defendants' letter of the 1st of January was a continuing guarantee. *THE NOTTINGHAM HIDE, SKIN, AND FAT MARKET COMPANY (LIMITED) v. JOHN BOTTRILL* — **694**

CONTINUING OFFENCE—Public Health Act, 1848 (11 & 12 Vict. c. 63)—Local Government Act, 1858 (21 & 22 Vict. c. 98)—Bye-Laws—Party-Walls—Practice on Appeals from Justices.] Bye-laws were made by the Local Board of Sunderland under the Public Health Act, 1848, s. 115, and the Local Government Act, 1858, s. 34, by one of which (No. 12) all party-walls, except in houses

CONTINUING OFFENCE—continued.

of one storey, were required, under a penalty of 40s., to be 9 inches at least in thickness, and by another of which (No. 42) it was provided that, "in case any offence under any of the foregoing bye-laws shall continue, the person offending shall be liable to a further penalty of not exceeding 40s. for each day during which such offence shall continue after written notice of the offence has been given by the local board to the offender."—The appellant having been convicted and fined for an offence against bye-law No. 12, in building a party-wall of 4½ inches in thickness instead of 9, was afterwards convicted upon an information charging him under bye-law 42 with *continuing* the offence, and again fined:—*Held*, that suffering the party-wall to remain unaltered was not a "continuing offence" within bye-law 42, or, if it was, that the bye-law was unreasonable,—the appropriate remedy being the removal of the structure by the board, as authorized by s. 34 of the Local Government Act, 1858.—*Quære* whether the party, if liable as a "continuing offender," would remain so liable after he had transferred the premises to a purchaser.—Upon the argument of an appeal from justices, no point can be urged which was not taken before them. MARSHALL *v.* SMITH - - - - - 416

CONTRACT, ACTION FOUNDED ON - 345

See COSTS UNDER COUNTY COURT ACTS.

— Breach—Damages Ex. Ch. 131, 167, 475

See DAMAGES FOR BREACH OF CONTRACT.
1, 2, 3.

— Breach—Liquidated damages - 70

See PENALTY.

CONVERSION—Waiver—Trustee in bankruptcy

See WAIVER OF TORT. [350]

CORRUPT PRACTICES (MUNICIPAL ELECTIONS) ACT, 1872 - 406

See DISQUALIFICATION OF TOWN COUN-
CILLOR.

COSTS—Action of contract - 345

See COSTS UNDER COUNTY COURT ACTS.

— Attorney and client—Agreement - 425

See AGREEMENT AS TO COSTS.

— Ejectment—Stay of proceedings - 29

See STAY OF PROCEEDINGS.

COSTS OF DEFENDING ACTION—Shipping—

Bill of Lading, Construction of—Rights and Duties of Master where no Consignee appears to claim the Goods—Lien for Freight—Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), s. 68.] Where an action is brought against A. to recover unliquidated damages for which he has become liable through the default of B., notice being given to B. (who declines to intervene), A. is justified in defending the action, and is not bound to let judgment go by default, or to pay money into Court.—The proper questions for the jury in such a case are, whether it was a reasonable thing to defend the action, and whether the defence was conducted in a reasonable manner.—The defendants shipped coals on board the ship *Pitho* for Buenos Ayres, under a bill of lading making them deliverable to the consignees on payment of freight, and containing a memorandum,—“The coals to be taken from the ship as soon as the

COSTS OF DEFENDING ACTION—continued.

master is ready to deliver, or to be landed at the expense and risk of the consignees.”—The *Pitho* arrived at Buenos Ayres on the 28th of November, 1869, and the master was ready to deliver the coals on the 23rd of December; but, no consignees appearing to claim them, he waited until the 20th of January, 1870, and then landed them. In an action against the defendants for damages for the detention of the ship at Buenos Ayres, it was left to the jury to say whether the defendants were responsible for the detention, and what would be a reasonable compensation for it. The jury found that the defendants were responsible for the detention, and they assessed the damages at 56*l.* But the judge having, in answer to a question from one of the jury at the close of his summing-up, stated that, there being no evidence that there were warehouses at Buenos Ayres such as existed at Liverpool and other places, into which goods might be placed and kept subject to the shipowner's lien for freight, under the Merchant Shipping Act, 1862, the owners would lose their lien by landing the coals:—*Held*, That, inasmuch as this answer was too general in its terms, and might have to some extent affected the assessment of damages, the defendants were entitled to a new trial.—*Seem* that, although there was no “statutable” warehouse at Buenos Ayres, the master might still have landed the coals there without losing his possession and control over them (placing them in a warehouse belonging to or hired by his owners), and so have preserved his lien for freight. MOORS-LE-BLANCH *v.* WILSON 227

COSTS OF EJECTMENT—Stay of proceedings 29

See STAY OF PROCEEDINGS.

COSTS UNDER COUNTY COURT ACTS—30 & 31

Vict. c. 142, s. 5—“Action founded on Contract.”]

In an action against a hackney carriage proprietor for not securely carrying certain luggage belonging to a person who had hired his carriage, the declaration alleged that in consideration that the plaintiff would with her luggage become a passenger in such carriage, and of certain reward to be paid to the defendant by the plaintiff in that behalf, the defendant promised to carry the plaintiff and her luggage safely, and that the defendant, not regarding his duty as hackney carriage proprietor nor his said promise, did not safely carry the plaintiff's luggage, but so carelessly and negligently conducted himself that part of the said luggage was lost. The plaintiff having recovered the sum of 20*l.* in the action:—*Held*, that she was deprived of costs by the County Courts Act, 1867, s. 5, the cause of action as set forth in the declaration being founded on contract.—*Tattan v. Great Western Ry. Co.* (2 E. & E. 844; 29 L. J. (Q.B.) 184) discussed. BAYLIS *v.* LINTOTT - - - - - 345

COUNTY COURT—Bankruptcy jurisdiction Ex. Ch.

See BANKRUPTCY JURISDICTION. [533]

— Committal—Jurisdiction - 378

See COMMITTAL UNDER DEBTORS ACT, 1869.

COUNTY COURT JURISDICTION—Committal 378

See COMMITTAL UNDER DEBTORS ACT, 1869.

COUNTY COURTS ACT, 1846, ss. 98, 99, 103 378

See COMMITTAL UNDER DEBTORS ACT, 1869.

COUNTY COURTS ACT, 1869, s. 5 - - - 345
See COSTS UNDER COUNTY COURT ACTS.

COUNTY VOTE—Parliament 245, 256, 259, 265,
 [269, 281, 306
See VOTE FOR PARLIAMENT. 1, 2, 3, 4,
 5, 6, 7.

COVENANT TO REPAIR—*Lease—Breaches—Assessment of Lessees' Compensation under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18)—Notice to Lessor to treat.* On the 15th of June, 1859, the plaintiff granted a lease to the defendants for twenty-one years, determinable at the option of either party at the expiration of the first seven or fourteen years. In February, 1866 (the first seven years of the term having elapsed), the lessees received notice from a railway company to treat for the purchase of their interest in the premises, under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); and the compensation payable to them by the company was assessed by an arbitrator on the 16th of April, 1867; on the 29th of July, 1870, judgment was signed for the amount, and an assignment was executed by the lessees, and the company took possession of the premises on the 21st of November, 1870.—On the 19th of June, 1868, the company gave the lessor notice to treat in respect of his interest, and he sent in a claim on the 29th; but nothing further was done,—the proposed line being abandoned.—In 1871, the lessor brought an action against the lessees for breaches of their general covenant to repair accruing as well before as since the assignment by the latter to the company.—Upon a case stated by an arbitrator for the opinion of the Court as to the principle upon which the damages were to be assessed:—*Held*, that there was nothing to prevent the lessor from recovering substantial damages in respect of breaches committed after the notice to treat, but before the assignment by the lessees to the railway company; and that the proper measure of damages was the amount by which the plaintiff's reversion had become deteriorated at the date when the company took possession under the assignment, viz., the 21st of November, 1870. *MILLS v. THE GUARDIANS OF THE POOR OF THE EAST LONDON UNION* - - - 79

CROSS CLAIMS—Set-off - - - 10
See EQUITABLE SET-OFF.

CUSTOM OF TRADE—Open policy—Declaration.
See INSURABLE INTEREST. 1. [18
 — Written contract - - - 489
See EVIDENCE TO VARY WRITTEN CONTRACT.

DAMAGES—Breach of contract **Ex. Ch. 131,**
 [167, 475

See DAMAGES FOR BREACH OF CONTRACT.
 1, 2, 3.

— Breach of covenant to repair - - - 79
See COVENANT TO REPAIR.

— Costs of defending action - - - 227
See COSTS OF DEFENDING ACTION.

— Liquidated - - - 70
See PENALTY.

— Replevin - - - 454
See ESTOPPEL BY JUDGMENT. 2.

DAMAGES—*continued.*

— Unliquidated - - - 10
See EQUITABLE SET-OFF.

DAMAGE BY SEA-WATER—*Marine Insurance—Sea Damage to Part of Goods insured—Consequent Depreciation in Value of Remainder.* A policy of marine insurance was expressed to be “on 1711 packages teas, valued at the sum insured, viz., \$31,000,” and contained a special warranty in the following terms, viz., “warranted by the assured free from damage or injury from dampness, change of flavour, or being spotted, discoloured, musty or mouldy, except caused by actual contact of sea-water with the articles damaged occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise, and the same practice shall obtain as to all other merchandises so far as practicable.”—The ship met with bad weather and shipped large quantities of sea-water, by contact with which 449 packages of the tea insured were greatly injured.—When teas are sold they are usually sold in the order of the consecutive numbers marked on the packages, and if the numbers be broken by some being omitted, or if some of the chests be marked as damaged, a suspicion is created that the other packages may be damaged, and they do not command such high prices as if none of the shipment had been damaged. In consequence of this the remaining 1262 packages, which had not been in contact with sea-water, sold for less than they would otherwise have fetched;—*Held*, that the assured could only recover in respect of the damage occasioned to the packages which had been actually in contact with sea-water, and not in respect of the loss occasioned by injury to the reputation of the remainder: and, *semble*, that the effect would have been the same even in the absence of the special warranty. *CATOR v. THE GREAT WESTERN INSURANCE COMPANY OF NEW YORK* - - - 552

DAMAGES FOR BREACH OF CONTRACT—*Common Carrier—Notice of Special Circumstances.* The plaintiffs, being shoe manufacturers at Kettering, were under a contract to supply a quantity of military shoes to a firm in London for the use of the French army at 4s. per pair, an unusually high price. The shoes were to be delivered by the 3rd of February, 1871, and the plaintiffs accordingly sent them to the defendant's station at Kettering for carriage to London, in time to be delivered there in the usual course in the evening of that day, when they would have been accepted and paid for by the consignees. Notice was given to the station master (which for the purposes of the case was assumed to be notice to the company) at the time that the plaintiffs were under a contract to deliver the shoes by the 3rd, and that unless they were so delivered they would be thrown on their hands; but he was not informed that there was anything exceptional in the character of the contract. The shoes were not delivered in London till the 4th of February, and were consequently not accepted by the consignees, and the plaintiffs were obliged to sell them at 2s. 9d. a pair, which, in consequence of the ces-

DAMAGES FOR BREACH OF CONTRACT—cont.

sation of the French war, was, apart from the previously-mentioned contract, the best price that could have been obtained for them, even if they had been delivered on the evening of the 3rd of February, instead of the morning of the 4th.—In an action against the defendants for the delay in delivering the shoes, they paid into Court a sufficient sum to cover any ordinary loss occasioned thereby, but the plaintiffs further claimed the sum of 267*l.* 3*s.* 9*d.*, the difference between the price at which they had contracted to sell the shoes and the price which they ultimately fetched:—*Held* (per Kelly, C.B., Blackburn, J., Mellor, J., Martin, B., and Cleasby, B., Lush, J., and Pigott, B., dissenting), that the plaintiffs were not entitled to recover the latter sum, the damage not being such as might reasonably be considered as arising naturally from the defendants' breach of contract, or such as might be reasonably supposed to have been in the contemplation of both parties at the time when they made the contract:—Per Kelly, C.B., Blackburn, J., and Mellor, J., and Cleasby, B., the notice given to the defendants was not such that they could reasonably be supposed to have had in their contemplation, at the time of entering into the contract for the carriage of the shoes, damages of such an exceptional nature as those claimed:—Per Martin, B., and, *semble*, per Blackburn, J., and Lush, J., a mere notice as such could not have the effect of rendering the defendants liable to more than ordinary damages; but it must in order to do so be given under such circumstances as to make it a term of the contract that the defendants will be liable for such damages if the contract be broken:—Per Lush, J., and Pigott, B., the notice given to the defendants was sufficient to put them upon inquiry as to the nature of the contract which the plaintiffs were under, and if they chose to accept the goods for carriage without further inquiry, they took the risk of what the contract might turn out to be, and were liable to the plaintiffs for the loss actually occasioned.—*Hadley v. Baxendale* (9 Ex. 341; 23 L. J. (Ex.) 179), discussed. *HORNE v. MIDLAND RAILWAY COMPANY*

Ex. Ch. 131

2. — *Contract—Measure of Damages in an Action for Breach of a Contract for Forward Monthly Deliveries—Breach before the Time for complete Performance.*] The defendant in April agreed to sell and the plaintiffs to buy 3000 tons of coal, at 8*s.* 6*d.* per ton, "to be taken during the months of May, June, July, and August." No coal having been taken by the plaintiffs in May, the defendant wrote on the 31st of that month desiring the plaintiffs to consider the contract cancelled. The plaintiffs did not assent to this; but on the 11th of June the defendant definitively refused to deliver any coal, and on the 3rd of July the plaintiffs brought an action for this breach.—At the trial, which took place on the 13th of August, the plaintiffs proved that the price of coal had risen during the whole period since the beginning of May, and was still rising. No evidence was given to shew whether the plaintiffs could have gone into the market and obtained a new contract for coals:—*Held*, that in the absence of evidence on the part of the defendant

DAMAGES FOR BREACH OF CONTRACT—cont.

that the plaintiffs could have obtained a new contract on such terms as to mitigate their loss, the true measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivery, notwithstanding that the last period had not elapsed when the action was brought, or when the cause was tried. *ROPER v. JOHNSON* - 167

3. — *Contract in the Alternative—Judgment by Default.*] The declaration stated that the plaintiff having shipped certain goods to a place abroad, drew against the shipment, and entrusted the drafts to the defendant for presentment, for reward to the defendant, on the terms that the defendant should return the drafts if not paid after acceptance to the plaintiff, or pay the plaintiff the amount of them; that all conditions were performed, &c., necessary to entitle the plaintiff to a return of the drafts or to payment of the amount of them, yet the defendant did not return the drafts nor pay the amount of them. Judgment was signed for want of a plea:—*Held* (per Keating, Brett, and Grove, JJ., Bovill, C.J., dissenting), that the damages on the contract alleged in the declaration must be the amount of the bills.—Per Bovill, C.J.: The contract as alleged in the declaration being a contract in the alternative, it might be performed by performance of either branch of the alternative at the election of the defendant, and therefore the damages might be the value of the bills, if of less value than the amount for which they were drawn. *DEVERILL v. BURNELL* - - - - 475

DAMAGES IN REPLEVIN—Estoppel - 454

See ESTOPPEL BY JUDGMENT.

DAMAGES UNDER £20—New trial - 647

See NEW TRIAL.

"DEBT" - - - - 24

See GARNISHEE ORDER.

DEBTORS ACT, 1869, ss. 4, 5 - 378

See COMMITTAL UNDER DEBTORS ACT, 1869.

— s. 21 - - - - 406

See DISQUALIFICATION OF TOWN COUNCILLOR.

DECK CARGO—Shippers' risk—Insurable interest - - - - 18

See INSURABLE INTEREST. 1.

DECLARATION OF INSOLVENCY—Bankrupt—Filing a Declaration of Inability to pay—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6.] The filing of a declaration of inability to pay by a debtor under s. 6, subs. 4, of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), is complete on the delivery of the document by a properly authorized person to the proper officer at the proper office, with intent that it should be filed or placed on record in the ordinary manner. *RANSFORD v. MAULE* - - - - 672

DECLARATION OF SHIPS—Open policy - 18

See INSURABLE INTEREST. 1.

DEDICATION—Highway—User - 704

See WAY, DEDICATION OF.

DEED—Acknowledgment by married woman - - - - 106

See ACKNOWLEDGMENT BY MARRIED WOMAN.

DEMURRAGE—Lay-days - - - 46

See COMMENCEMENT OF LAY-DAYS.

DESCRIPTION OF GOODS SHIPPED—*Shipping*

—*Bill of Lading*—“*Weight, Value, and Contents unknown*”—*Misrepresentation—Estoppel*.] The plaintiffs delivered to the defendants, for carriage on board the defendants' ship, a closed case containing silk goods. The bill of lading, as tendered by the plaintiffs for signature, described the contents of the case as linen goods; but before signing it the captain impressed upon it with a stamp the words “Weight, value, and contents unknown.” The freight charged for silk was higher than that for linen goods, and the freight paid for the goods so delivered was that for linen goods; but the plaintiffs represented the goods to be linen inadvertently and without fraudulent intention. On the ship's arrival at her destination it was found that two pieces of silk had been abstracted from the case. In an action by the plaintiffs against the defendants as common carriers for non-delivery of the silk goods so lost:—*Held*, that the result of the addition of the words “Weight, value, and contents unknown” to the bill of lading was completely to do away with the effect of the description of the goods as linen, and that consequently the defendants' contract was to carry the case and its contents, whatever they might be; and the plaintiffs were entitled to maintain the action.—*Quære* whether, even without the additional words, the misrepresentation, having been made without fraud, could have had the effect of avoiding the contract for carriage of the goods by the defendants as common carriers.—*Jessel v. Bath* (Law Rep. 2 Ex. 267) followed. *LEBEAU v. THE GENERAL STEAM NAVIGATION COMPANY* - - - 88

2. — *Shipping—Bill of Lading*—“*Quantity and Quality unknown*.”] The defendant chartered the ship *Avoca* to carry a cargo of grain from Ibraila to a port in the United Kingdom for a freight of “7s. per imperial quarter delivered;” and the charterparty provided that, in the event of the cargo or any part thereof being delivered in a damaged or heated condition, the freight should be payable “on the invoice quantity taken on board as per bill of lading, or half-freight upon the damaged or heated portion, at the captain's option.” Under this charterparty 1021 kilos. of barley, equal to 2368 imperial quarters, were shipped at Ibraila, and the captain signed a bill of lading with the following words written at the foot, which was proved to be usual in the grain carrying trade,—“Quantity and quality unknown.” The *Avoca* experienced bad weather on her homeward voyage: and when she arrived at Ramsgate, where the cargo was discharged, it was agreed that 80 quarters of the barley had been damaged by heating: and the master claimed to be paid freight on the invoice quantity taken on board:—*Held*, that he was entitled to be so paid, notwithstanding the memorandum at the foot of the bill of lading. *TULLY v. TERRY* - - - 679

DESTRUCTION OF EASEMENT - - - 162

See ALTERATION OF EASEMENT.

DEVASTAVIT—*Estoppel* - - - Ex. Ch. 56

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DISCOVERY—Interrogatories—*Libel* - 362
See LIBEL.

DISQUALIFICATION OF TOWN COUNCILLOR—*Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 40)—Election of Town Councillor—Disqualification by Composition with Creditors—Municipal Corporations Act (5 & 6 Wm. 4, c. 76) s. 52—Debtors Act, 1869 (32 & 33 Vict. c. 62) s. 21—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 126.*] By s. 52 of the Municipal Corporations Act, 5 & 6 Wm. 4, c. 76, it is enacted that a town councillor who becomes bankrupt or compounds with his creditors by deed, shall “thereupon immediately become disqualified and shall cease to hold the office of such councillor,” and “the council thereupon shall forthwith declare the office void, and shall signify the same by notice, &c., and the said office shall thereupon become void;” but that “every person so becoming disqualified and ceasing to hold such office on account of his being so declared bankrupt or having compounded with his creditors as aforesaid, shall, on obtaining his certificate, or on payment of his debts in full, be capable of being re-elected to such office.” And by s. 21 of the Debtors Act, 1869 (32 & 33 Vict. c. 62) those provisions are extended to persons who have compounded with their creditors “whether by deed or otherwise.”—*B.*, a town-councillor of Newcastle, in July, 1872, made a composition with his creditors under s. 126 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), under which a resolution was come to for a composition of 3s. 6d. in the pound (secured) in satisfaction of B.'s debts, the first instalment of which was payable six months after registration of the confirming resolution. The registration took place on the 23rd of September. On the 4th of November, B. placed his resignation of his office of councillor in the hands of the town-clerk, and announced his resignation by advertisement on the 6th of November, and by the same advertisement offered himself for re-election. At the annual meeting of the town-council on the 9th of November, the above letter was read, and B.'s resignation was accepted by the council; and on the 18th (there having been no declaration by the council that the office was void) he was re-elected a town councillor.—Upon a case stated for the opinion of the Court, pursuant to s. 15 of the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 40):—*Held*, that B., having by reason of his having compounded with his creditors ceased to hold the office of councillor, was incapable of resigning it, and, the council not having pursued the course pointed out by s. 52 of the Municipal Corporations Act, that the election was therefore void.—*Held*, also, that B. not having “paid his debts in full,” he was not qualified for re-election under that section. *HARDWICK v. BROWN* - - - 406

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[269, 281, 306]	
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EQUITABLE SET-OFF — <i>Unliquidated Damages</i>	
— <i>Cross Claims arising out of the same Contract.</i>	
To a declaration for money lent and paid and commission the defendant pleaded for a defence on equitable grounds, that it was agreed between the plaintiffs and himself, on the following terms, viz., that he should consign certain rice to the plaintiffs' firm at Buenos Ayres and Monte Video, for sale by the plaintiffs for him upon commission; that the plaintiffs should make certain advances against the rice and pay the expenses of the consignment; and that the plaintiffs should sell the rice, and satisfy out of the proceeds the said advances, expenses, and commission, and pay to the defendant the balance remaining out of such proceeds. The plea further stated that the rice was duly consigned to the plaintiffs under the agreement; that the claims in the declaration were the advances, expenses, and commission contemplated by the agreement; and that the plaintiffs were guilty of such negligence and improper conduct in the care of the rice and the management of the sale of it, that it fetched much less than it ought to have done, and insufficient to satisfy the advances, expenses, and commission, whereas it would, but for their negligence and misconduct, have realised sufficient, and much more than sufficient, to have fully paid and satisfied the same, and the deficiency arising upon the sale, which was the claim	

EQUITABLE SET-OFF—*continued.*

for which the action was brought, had therefore entirely arisen from the plaintiffs' negligence, default, and misconduct:—*Held*, a bad plea. *BEST v. HILL* - - - - - 10

ESTOPPEL—Description of goods shipped 88
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— Judgment—Executor - - - Ex. Ch. 56

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ESTOPPEL BY JUDGMENT—*Executor—Plene Administravit—Judgment of Assets—Devastavit—Assent of Creditors to Misapplication of Assets—Estoppel.*] In an action against an executor a plea of plene administravit was pleaded, and the action having been referred, the arbitrator found against the defendant upon the plea, and the plaintiff accordingly signed judgment. The plaintiff afterwards brought his action upon the judgment against the defendant, suggesting a devastavit. The defendant sought to set up, by way of defence, facts which tended to shew that, though assets had come to his hands before the judgment, and had been illegally appropriated, such misappropriation had taken place with the consent and concurrence of the plaintiff, and that he was therefore estopped from complaining of it:—*Held* (affirming the decision of the Court below), that if the facts which the defendant sought to set up amounted to a defence, they might have been rendered available under the plea of plene administravit, and the defendant could not, therefore, set them up as negating the devastavit. *JEWSBURY v. MUMMERY* Ex. Ch. 56

2. — *Replevin—Judgment recovered—Special Damage—Trespass to Land—Mortgagor and Mortgagee.*] Certain premises were let to the plaintiff by P., who had previously mortgaged them to the defendants, the trustees of a benefit building society, to secure payment of subscriptions, &c., which might become due from him to the society. The mortgage deed gave power to the defendants to distrain the goods of P., on the premises for arrears of subscriptions due to the society, as for rent due on a demise. The defendants distrained on the premises for subscriptions due from P., and seized the plaintiff's goods. The plaintiff replevied the goods, and recovered in the action of replevin, in the county court, as damages, the amount of the expenses of the replevin bond. Having sustained further consequential damages by reason of the seizure of his goods, he subsequently brought an action of trespass in the superior Court, to recover these damages, and also in respect of the trespass to the land:—*Held*, that the judgment in replevin was a bar to the action in respect of trespass to the goods, inasmuch as the special damage was recoverable in the action of replevin.—And, with respect to the trespass to the land, that the judgment in replevin was no bar to the action; but that the defendants were entitled to the verdict on a plea of not possessed, inasmuch as they had done no act to recognise the plaintiff as a tenant. *GIBBS v. CRUIKSHANK* 454

EVIDENCE—Negligence - - - 390
See EVIDENCE OF NEGLIGENCE.

EVIDENCE—continued.

— Pasturage—Presumption - Ex. Ch. 527

See COMMON IN GROSS.

— Payment—Cheque - - - 685

See EVIDENCE OF PAYMENT.

EVIDENCE OF NEGLIGENCE—Proprietors of public Carriage.] A passenger in an omnibus was injured by a blow from the hoof of one of the horses, which had kicked through the front panel of the vehicle. There was no evidence on the part of the plaintiff that the horse was a kicker; but it was proved that the panel bore marks of other kicks, and that no precaution had been taken, by the use of a kicking-strap or otherwise, against the possible consequences of a horse striking out, and no explanation was offered on the part of the defendants:—*Held*, that there was evidence of negligence proper to be submitted to a jury. *JAMES SIMPSON AND WIFE v. THE LONDON GENERAL OMNIBUS COMPANY* - - 390

EVIDENCE OF PAYMENT—Receipt for Money by a Third Party—Res inter Alios—Cheque—Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 12.] Under s. 12 of the Railways Clauses Act, 1863, where a railway forms a junction with another railway, the company with whose railway the junction is made is empowered to erect such signals and conveniences incident to the junction, &c., as may be necessary for the prevention of danger to or interference with the traffic at or near the junction; and the expenses of erecting and maintaining such signals, &c., are at the end of each half-year to be repaid by the company making the junction:—*Held*, that, to sustain an action for such expenses, proof must be given that they have been actually paid: proof that a liability has been incurred for them is not enough.—To prove payment, the plaintiff's secretary stated that he, on the 25th of February, sent to the persons who did the work a cheque for the amount of their bill, and got from them by return of post (on the 26th) a receipt; and the cashier of the latter stated that he received the cheque at 9 a.m. on the 26th as payment, and sent a receipt:—*Held*, (Bovill, C.J., dissenting), that the receipt was admissible, with the other facts, to prove payment on the morning of the 26th of February (the action having been brought on that day), without shewing that the cheque was honored. *THE CARMARTHEN AND CARDIGAN RAILWAY COMPANY v. THE MANCHESTER AND MILFORD RAILWAY COMPANY* - - - 685

EVIDENCE TO VARY WRITTEN CONTRACT—

Written Contract—Evidence of Trade Usage—Charterparty—Principal and Agent.] The defendants, acting as agents for one L., chartered a ship for the conveyance of a cargo of currants from the Ionian Islands. The charterparty was expressed to be made and was signed by the defendants, as "agents to merchants," the name of the principal not being disclosed:—*Held*, on the authority of *Humfrey v. Dale* (E. B. & E. 1004; 27 L. J. (Q. B.) 390) and *Fleet v. Murton* (Law Rep. 7. Q. B. 126), that evidence was admissible in an action by the shipowners against the defendants upon the charterparty, of a trade usage, by which, if the name of the principal is not disclosed within a reasonable time, the agents themselves are personally liable. *HUTCHINSON v. TATHAM* 489

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EXPENSES OF SIGNALS—Payment - 685

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FOREIGN ATTACHMENT—Mayor's Court [107, 118, 121]

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FORFEITURE—Summons—Limitation of time

See GENERAL LINE OF BUILDING. [441]

FORWARD DELIVERIES—Measure of Damages [167]

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[241, 245, 256, 259, 265, 269, 281, 306]

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— Lien—Landing goods - - 227

See COST OF DEFENDING ACTION.

— Lump Sum—Loss of part of goods - 465

See LUMP FREIGHT.

GAME—Reservation to lord of manor - 514

See RIGHT OF SPORTING.

GARNISHEE ORDER—Attachment of Debts—

Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125) ss. 60, 61—Surplus of Bankrupt's Estate

—"Debt"—*Official Assignee.* An order having been made for the attachment of the surplus of a bankrupt's estate against the official assignee of the Court of Bankruptcy as garnishee, under the Common Law Procedure Act, 1854:—*Held*, that such order was invalid, there being no "debt" that could be attached within the meaning of the Act. *HUNTER v. GREENSILL; PAGET, GARNISHEE* 24

GARNISHMENT - - - 24

See GARNISHEE ORDER.

GENERAL LINE OF BUILDING—Metropolis Local

Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 75—Limitation of Time for Summons for

a Penalty or Forfeiture, under s. 107.] By s. 75 of the Metropolis Local Management Amendment Act, 1862, the erection, without the consent of the Metropolitan Board of Works, of any building, &c., in any street, &c., beyond the general line of buildings is prohibited, and it is enacted that for any infringement of that provision the vestry or board may summon the offender before a justice, who may order the demolition of the building and make an order for costs; and that, on default by the owner, the vestry or board may enter and demolish it. And s. 107 enacts that "no person

GENERAL LINE OF BUILDING—*continued.*

shall be liable for the payment of any penalty, or forfeiture under the recited Acts or that Act, for any offence made cognisable before a justice, unless the complaint respecting such offence have been made before such justice within *six months* next after the commission or discovery of such offence:—*Held*, that this limitation clause applies only to the case of pecuniary penalties or forfeitures, and not to offences under s. 75. *THE VESTRY OF BERMONDSEY v. JOHNSON* - 441

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— Reservation of game - - - 514

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INCONSISTENT ENACTMENTS—*Act of Parlia-*

ment, Construction of—Inconsistent Provisions—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20)—London, Chatham, and Dover Railway (Metropolitan Extension) Act, 23 & 24 Vict. c. clxxvii.] By s. 65 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), it is enacted that, "where, under the provisions of this or the special Act, or any Act incorporated therewith, the company are required to maintain or keep in repair any bridge, &c., executed by them, it shall be lawful for two justices, on the application of the surveyor of roads, &c., complaining that any such work is out of repair, after not less than ten days' notice to the company, to order the company to put such work into complete repair within a period to be limited for that purpose,"—under a penalty of 5*l.* per day.—By s. 2 of the London, Chatham, and Dover Railway (Metropolitan Extension) Act, 1860 (23 & 24 Vict. c. lxxvii), the general Acts of 1845, 8 & 9 Vict. c. 18, 20, except in so far as their provisions are "expressly varied or excepted" by the special

INCONSISTENT ENACTMENTS—*continued.*

Act, are incorporated with the special Act: and s. 90 contains provisions with reference to carrying the railway by means of bridges over certain roads, including the Clapham Road.—By s. 97 of the special Act it is enacted that, if the company shall fail to repair and keep in good and complete repair to the satisfaction of the surveyor the bridges, &c., and other works connected with crossing the roads or footpaths, and, if after notice thereof given to the company by or on behalf of the trustees, the company fail for three days to begin such repairs and proceed therein with all reasonable expedition until the same shall be completed, the trustees may repair and make good the same, &c.; and all the costs, charges, and expenses incurred in that behalf by the trustees shall be paid on demand by the company, or, on failure of payment for twenty-one days after such demand, the same may be recovered from the company, with costs, in any court of competent jurisdiction.—Upon an appeal by the company against an order of a magistrate under s. 65 of the general Act, requiring them to put the bridge into complete repair within two calendar months, the question for the opinion of the Court was whether the provisions of the general Act are expressly varied by those of the special Act, so as to render s. 65 of the former inapplicable:—*Held*, that they were so varied; but that, inasmuch as the Turnpike Acts, under which the trustees referred to in s. 97 of the special Act acted, had expired, the provisions of the general Act would, upon such determination of the turnpike trust, revive, and consequently that the order of the magistrate was valid. *THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY v. BOARD OF WORKS, WANDSWORTH* - - - 185

INJURIOUS AFFECTION—Compensation

[*Ex. Ch.* 191]

See COMPENSATION UNDER LANDS CLAUSES ACT.

INSURABLE INTEREST—*Marine Insurance—*

Extent of Right of Consignees (under Advances) to insure and recover in their own Names.] The plaintiffs, merchants in London, were in the habit of receiving consignments of cotton from correspondents abroad, and amongst others from Bell & Co., of Bombay, making advances thereon by acceptances against the consignments. For the purpose of covering these consignments and their advances, the plaintiffs effected open floating policies with the defendants, an insurance company, expressing that the insurances were made by them "as well in their own names as for and in the name or names of all and every person and persons to whom the same doth, may, or shall appertain, in part or in all." Each of the policies so effected was for 5000*l.* "on cotton, &c., from Bombay to London," &c., "by ship or ships;" and, as the plaintiffs received advices of the shipments, they declared upon the policies, in the usual way, the particulars and value of the goods and the names of the vessels by which they were shipped.—On the 29th of April, 1870, Bell & Co. advised the plaintiffs of the shipment of 250 bales of cotton on board the *Aurora*, and of their having drawn upon them for 3000*l.*, at six months' sight, on account of that shipment, and requesting them

INSURABLE INTEREST—continued.

to insure the cotton. This bill was negotiated by Bell & Co. through the National Bank of India, with whom the shipping documents were lodged as security. The bill, with the shipping documents annexed, was transmitted by the bank to their manager in London, and on the 21st of May the plaintiffs accepted it "against delivery of shipping documents" for the cotton.—With the assent of the National Bank, the 250 bales of cotton per *Aurora*, valued at 5000*l.*, were on the 23rd of May declared by the plaintiffs (who thereby intended to insure for Bell & Co. and themselves) upon two open policies which they then had running with the defendants; and the plaintiffs wrote to the bank undertaking "to hold the amount insured at their disposal until payment of their acceptances for 3000*l.* due 24th November."

—The *Aurora* left Bombay with the cotton on board, and was lost at sea on the 11th of June.—The plaintiffs afterwards paid their acceptance and received the bill of lading for the cotton.—In an action upon the policies to recover for the loss of the goods, the declaration averred that the plaintiffs caused themselves to be insured, that they or some or one of them were or was interested in the goods to the amount of all the moneys by them insured thereon, and that the insurances were made for the use and benefit and on account of the person or persons so interested. The defendants traversed these allegations.—*Held*, by the whole Court, that the plaintiffs were entitled to recover upon these policies to the extent of their advance.—*And held*, by Bovill, C.J., and Denman, J. (the Court being by agreement at liberty to draw inferences of fact), that the plaintiffs had an equitable interest in every part of the cotton as security for their liability under their acceptance, and, being also consignees to manage the consignment, they were entitled to insure the whole of it in their own names, and to its full value, and that, having intended by the insurances to cover the interests of all parties in the cotton, they were entitled to recover the whole amount upon a declaration averring interest in themselves; and that they would hold any surplus beyond their advance as trustees for the other parties beneficially interested; and that their right to insure and to recover was not limited to their own beneficial interest in the goods.—*Held*, contra, by Keating and Brett, JJ., that the plaintiffs were not entitled to recover under these policies, in their own names, anything beyond their actual advance,—the only interest they had in the cotton being a right by an existing contract to have the bill of lading indorsed to them on payment of their acceptance, so as to enable them to sell the cotton to pay themselves 3000*l.* and their expenses, and to earn their commission, and to hold the surplus proceeds as agents for the consignors; and they being at the time of the loss neither legal owners of the cotton nor in equity trustees as to the surplus for the consignors. *EBSWORTH v. ALLIANCE MARINE INSURANCE COMPANY* - 596

2. — *Ship and Shipping—Marine Insurance—Deck Cargo—Open Policy—Declaration of Ships.* C. & Co., shipowners, were in the habit of receiving shipments of cotton to be carried on deck, sometimes at the shipper's request

INSURABLE INTEREST—continued.

and at his risk, in which case the bill of lading expressed it to be so shipped, and sometimes for their own convenience, in which case it was at their own risk, and a clean bill of lading was given. To protect themselves against probable loss by jettison in the case of cotton shipped as last mentioned, C. & Co., through the plaintiff, their insurance broker, had effected with the defendants, on the 29th of March, 1864, an open policy to a certain specified amount, to be subsequently declared on. A parcel of cotton consisting of 102 bales was shipped on the 20th of December, 1864, at Alexandria, on board a ship belonging to C. & Co. This cotton was intended to be shipped on deck at shipper's risk, but by mistake C. & Co.'s agent gave a clean bill of lading in respect of it. Being supposed to be at shipper's risk, it was not declared under the policy, but other shipments of cotton on various vessels, some of them subsequent in date to the shipment of the 20th of December, were declared to the full amount of the policy. The 102 bales were lost by jettison, and the holders of the bill of lading claimed payment of the value of the cotton. The plaintiff thereupon altered the declarations on the policy by declaring the 102 bales, in substitution for a portion of the cotton subsequently shipped. According to the usage of the insurance business, as found in a special case stated between the plaintiff and defendants in an action to recover the value of the 102 bales on the policy of the 29th of March, in the case of policies on ships to be declared the policy attaches to the goods as soon as and in the order in which they are shipped, in which order the assured is bound to declare them. In case of mistake as to the order of shipment he is bound to rectify the declarations, which is sometimes done even after loss.—*Held*, that C. & Co. had an insurable interest in the 102 bales of cotton, inasmuch as by the terms of the bill of lading, signed by their agent, and by which they were bound, the cotton was at their risk; that the usage, as stated in the case, was binding, since it was not unreasonable, and by virtue of it the declaration on the policy could be rectified even after the loss was known; that even apart from the usage as stated, the doctrine to be deduced from the authorities is that, according to the usage of merchants and underwriters recognised by the Courts without parol proof in each case, a declaration may be altered even after the loss is known, if such alteration be made without fraud, of which there was no evidence in the present case; and that the plaintiff was, on these grounds, entitled to recover the value of the 102 bales on the policy of the 29th of March. *STEPHENS v. THE AUSTRALASIAN INSURANCE COMPANY* - 18

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(18 & 19 Vict. c. 67)— <i>Affidavit of Merits.</i>] To	
entitle a defendant served with a writ under the	
Bills of Exchange Act, 1855, to leave to appear	
and defend, it is not necessary that he should	
produce an affidavit of merits. It is enough if the	
affidavit discloses any defence, whether legal or	
equitable. CASELLA v. DARTON - - -	100

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LIBEL — <i>Practice</i> — <i>General Plea of Justification</i> —	
<i>Particulars</i> — <i>Time for Allowance of Interrogatories.</i>] In an action for a libel substantially	
charging the plaintiff, a shipowner, with sending	
ships to sea over-insured, overloaded, and under-	
manned, and with an habitual disregard of human	
life in the conduct of his business, a judge at	
chambers allowed the defendant to plead general	
pleas of justification, "that the several words and	
matters concerning the plaintiff were true in sub-	
stance and in fact," subject to particulars.—The	
Court sustained the order, holding it to be a more	
convenient course than setting out the several	
matters of justification upon the record.—An order	
having been made for the delivery by the defendant	
of particulars of the several matters he intended to	
rely on under his pleas of justification, stating the	
substance of each case, with the dates of the several	
matters relied on, or, in default, that the pleas	
should be struck out:—The Court refused to allow	
him to administer interrogatories to the plaintiff	
for the purpose of enabling him to comply with	
the order, in the absence of an affidavit disclosing	
circumstances to warrant a departure from the	
general rule. GOURLEY v. PLIMSOLL -	362
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ment - - -	645
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LORD MAYOR'S COURT — <i>Foreign Attachment</i> —	
<i>Prohibition</i> —"Cause of Action"— <i>Mayor's Court</i>	
<i>of London Procedure Act, 1857</i> (20 & 21 Vict. c.	
<i>civil.</i>).] The cause of action,—that is, the whole	
substantial cause of action,—must arise and the	
garnishee must reside or carry on business within	
the city of London, in order to give the Lord	
Mayor's Court jurisdiction to attach moneys, &c.,	
of the debtor in the hands of a garnishee.—The	
defendants (who had no residence or place of busi-	
ness in London) drew bills in Philadelphia upon	
the Union Bank of London, and indorsed them in	
Philadelphia, and there delivered them to the	
agents of the plaintiffs, who remitted them to the	
plaintiffs in London. The drawees refusing to	
accept the bills, the plaintiffs issued an attach-	
ment out of the Lord Mayor's Court to attach	
moneys of the drawers in the hands of the gar-	

LORD MAYOR'S COURT—continued.

nishees, bankers in London:—*Held*, that the "cause of action" arose in America and not in London, and consequently that the garnishees were entitled to a prohibition.—*Addition to the head-note of Mayor of London v. Cox* (Law Rep. 2 H. L. 239), by Willes, J. *IN THE MATTER OF COOKE v. GILL; THE UNION BANK OF LONDON, GARNISHEES* - - - - - 107

2. — *Foreign Attachment—Declaring in Prohibition.*] The plaintiffs attached by process in the Lord Mayor's Court money of the defendants in the hands of the garnishees. A rule nisi was obtained for a writ of prohibition, on the ground that the action was brought to recover calls in a public company in course of winding up, under an order made by the Master of the Rolls out of the jurisdiction of the Lord Mayor's Court, and that the defendant was a foreigner having no residence or place of business in England. Cause was shewn upon an affidavit stating that the contract for the purchase of the shares was made in London, and that the defendant carried on a large banking business through the garnishees as his agents in the city of London.—The plaintiffs being desirous of questioning the decision in *Cooke v. Gill* (ante, p. 107), the rule was enlarged upon their undertaking to declare in prohibition. *IN THE MATTER OF WHINNEY v. SCHMIDT; THE LONDON AND WESTMINSTER BANK, GARNISHEES* - - - - - 118

3. — *Foreign Attachment—Prohibition not grantable to the Defendant in the Suit—Mayor's Court Act, 1857 (20 & 21 Vict. c. clvii.), s. 15.*] The defendant in the suit in the Lord Mayor's Court cannot move for a writ of prohibition, to stay the proceedings in a foreign attachment. *BAKER v. CLARK* - - - - - 121

4. — *London—Prohibition—New Trial in the Mayor's Court after a Rule for a Nonsuit made absolute in a Superior Court.*] Notwithstanding s. 10 of the Mayor's Court London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), this Court has no power to prohibit the Lord Mayor's Court from proceeding to re-try an action there, after a rule absolute for a nonsuit in this Court upon a point reserved. *IN THE MATTER OF LEBEAU v. THE GENERAL STEAM NAVIGATION COMPANY* - 129

5. — *Mayor's Court Procedure Act (20 & 21 Vict. c. clvii.) ss. 8, 10—New Trial—Leave reserved—"Upon Trial of any Issue."*] By the Mayor's Court Procedure Act, s. 10, it is provided that if the judge, "upon the trial of any issue," shall grant leave to move in any of the superior Courts to enter a verdict or nonsuit, or for a new trial, the party to whom such leave is granted may move accordingly, in such Court, within the time within which motions of the like kind may be made in such Court.—Where in a case tried on Thursday the judge, immediately after the trial, refused leave to move, but on the following Monday changed his mind and granted it:—*Held* (by Bovill, C.J., and Keating and Grove, J.J., Brett, J., dissenting), that the leave could not be considered as given "upon the trial of the issue" in accordance with the Act. *FOLKARD v. THE METROPOLITAN RAILWAY COMPANY* - - - - - 470

LOSS OF FREIGHT—Marine Insurance—Right of Charterer to throw up Charterparty where Vessel disabled.] The plaintiff, on the 9th of November, 1871, effected an insurance "on chartered freight valued at 2900l. at and from Liverpool to Newport in tow, whilst there, and thence to San Francisco," &c. The ship left Liverpool on the 2nd of January, 1872, and on the 4th, before arriving at Newport, took the rocks in Carnarvon Bay. She was got off much damaged, and returned to Liverpool on the 12th of April, where she was sold under circumstances which the Court held not to be justifiable; there being no satisfactory evidence of a constructive total loss. She was repaired by the purchaser, and was still under repair at the time of the trial, the 16th of April, 1872.—By the charterparty the vessel was to proceed with all convenient speed (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. After the vessel took the rocks, and before she was got off, viz. on the 15th of February, the charterers threw up the charter, and on the following day they hired another ship to carry the rails (which were wanted for the construction of a railway) to San Francisco. The plaintiffs sued the underwriters for a loss of the chartered freight. The jury found that the time necessary for getting the ship off and repairing her was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time, and so long as to put an end in a commercial sense to the commercial speculation entered upon by the ship-owner and the charterers:—*Held*, by Keating and Brett, J.J., that the charterers were absolved from loading the vessel, and that the ship-owner therefore might recover for the loss of freight.—*Held*, contra, per Bovill, C.J., that the charterers were not entitled to throw up the charter, and that consequently the plaintiff could not recover against the underwriters, and that the findings of the jury were immaterial. *JACKSON v. THE UNION MARINE INSURANCE COMPANY, LIMITED* - - - - - 572

LOSS OF PAWN TICKET - - - - - 122

See PAWN BROKER.

LOSS, PARTIAL—Depreciation in value - 552

See DAMAGE BY SEA WATER.

LOSS, TOTAL—Restraint of princes - 649

See RESTRAINT OF PRINCES.

LOST DOCUMENT—Married woman—Commission - - - - - 106

See ACKNOWLEDGMENT BY MARRIED WOMAN.

LUMP FREIGHT—Ship and Shipping—Charterparty—Loss of Part of Cargo by Perils of the Sea without Default of Shipowner—Deduction from Freight.] A charterparty from Riga to London provided that the ship should load a full and complete cargo of lath-wood, and deliver the same on being paid freight as follows; a lump sum of 315l. There was the usual exception of sea risks, and the freight was to be paid half on arrival, and the remainder on unloading and right delivery of cargo. Part of the cargo, loaded in accordance with the charterparty, was lost by perils of the sea, without any default of the master or crew:—*Held*, that the shipowner was, on delivery of the

LUMP FREIGHT—*continued.*

remainder of the cargo, entitled to the full sum.
ROBINSON v. KNIGHTS - - - - 406

MANOR, LORD OF—Reservation of Game 514
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MANORIAL RIGHT—Reservation of Game 514
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MARRIED WOMAN—Acknowledgment - 106
See ACKNOWLEDGMENT BY MARRIED WOMAN.

MARINE INSURANCE—Concealment - 216
See CONCEALMENT OF MATERIAL FACT.

— Damage to part of goods - - - 552
See DAMAGE BY SEA-WATER.

— Insurable interest - - - 18, 596
See INSURABLE INTEREST. 1, 2.

— Land transit - - - - 649
See RESTRAINT OF PRINCES.

— Loss of freight - - - - 572
See LOSS OF FREIGHT.

— Place of risk - - - **Ex. Ch.** 548
See PLACE OF RISK UNDER POLICY.

— Restraint of princes - - - 649
See RESTRAINT OF PRINCES.

MASTER AND SERVANT—Negligence of servant
See NEGLIGENCE OF SERVANT. [563]

— Tort of servant - - - **Ex. Ch.** 148
See TORTIOUS ACT OF SERVANT.

MATERIAL FACT—Concealment - - 216
See CONCEALMENT OF MATERIAL FACT.

MAYOR'S COURT, LONDON 107, 118, 121,
 [129, 470]
See LORD MAYOR'S COURT. 1, 2, 3, 4, 5.

MAYOR'S COURT OF LONDON PROCEDURE ACT, 1857 - - - 107, 121, 470
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MEASURE OF DAMAGES - - - 227
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— Breach of contract **Ex. Ch.** 131, 167, 475
See DAMAGES FOR BREACH OF CONTRACT. 1, 2, 3.

— Covenant to repair - - - 79
See COVENANT TO REPAIR.

MERCHANT SHIPPING ACT, 1862, s. 68 - 227
See COSTS OF DEFENDING ACTION.

METROPOLIS LOCAL MANAGEMENT ACT, 1856, s. 102 - - - 401
See COAL-PLATE IN HIGHWAY.

METROPOLIS LOCAL MANAGEMENT ACT, 1862, ss. 75, 107 - - - 441
See GENERAL LINE OF BUILDINGS.

MINERALS—Reservation—Compensation 336
See RESERVATION OF MINES.

MINES—Reservation—Compensation - 336
See RESERVATION OF MINES.

MINISTERIAL DUTY—Breach—Action - 489
See BREACH OF MINISTERIAL DUTY.

MISREPRESENTATION—Agent—Warranty 427
See WARRANTY OF AUTHORITY.

— Description of goods shipped - - 88
See DESCRIPTION OF GOODS SHIPPED. 1.

MONTHLY DELIVERIES—Measure of damages

See DAMAGES FOR BREACH OF CONTRACT. 2. [167]

MORTGAGE—Replevin—Estoppel - - 454
See ESTOPPEL BY JUDGMENT. 2.

— Sale—Pleading - - - 358
See SALE BY MORTGAGE.

MUNICIPAL CORPORATIONS ACT, s. 52 - 406
See DISQUALIFICATION OF TOWN COUNCILLOR.

MUNICIPAL ELECTION—Disqualification 406
See DISQUALIFICATION OF TOWN COUNCILLOR.

— Presiding officer—Action - - 489
See BREACH OF MINISTERIAL DUTY.

MUTUAL CREDIT—Set-off - - - 10
See EQUITABLE SET-OFF.

NEGLIGENCE—Arbitrator - - - 1
See ARBITRATOR.

— Evidence—Public carriage - - 390
See EVIDENCE OF NEGLIGENCE.

— Master and servant - - - 563
See NEGLIGENCE OF SERVANT.

NEGLIGENCE OF SERVANT—*Master and Servant—Liability of Master—Scope of Employment.*

A stevedore employed to ship iron rails had a foreman whose duty it was (assisted by labourers) to carry the rails from the quay to the ship after the carman had brought them to the quay and unloaded them there. The carman not unloading the rails to the foreman's satisfaction, the latter got into the cart and threw out some of them so negligently that one fell upon and injured the plaintiff, who was passing by:—*Held*, per Grove and Denman, JJ. (Brett, J., dissenting), that there was evidence for the jury that the foreman was acting within the scope of his employment, so as to render the stevedore responsible for his acts. **BURNS v. POULSON** - - - 563

NEW TRIAL—*Damages under 20l.—Replevin.* The rule that a new trial will not be granted for either party where the sum given or recoverable is under 20l., does not apply to replevin. **EDGSON v. CARDWELL** - - - 647

— Leave reserved - - - 470
See LORD MAYOR'S COURT. 5.

NON-PAYMENT OF MONEY—Attachment 104
See ATTACHMENT FOR NON-PAYMENT OF MONEY.

NOTICE—Animal having contagious diseases 322
See CONTAGIOUS DISEASES (ANIMALS) ACT, 1869.

NOTICE OF ABANDONMENT—Restraint of Princes - - - 649
See RESTRAINT OF PRINCES.

NOTICE OF APPEAL—Registration - 241
See VOTE FOR PARLIAMENT.

NOTICE TO PROCEED—Stay of proceedings 29
See STAY OF PROCEEDINGS.

NOTICE TO TREAT—Covenant to repair—Damages - - - 79
See COVENANT TO REPAIR.

NUISANCE—Insecure coal-plate - - - 401
See COAL-PLATE IN HIGHWAY.

OBSTRUCTION OF HIGHWAY—Compensation
 Ex. Ch. 191
See COMPENSATION UNDER LANDS CLAUSES ACT.

OFFICE COPY OF AFFIDAVITS—*Practice—Motions.*] The Court will in no case dispense with the practice which requires a party shewing cause against a rule to take office copies of the affidavits upon which it is moved. *IN RE CHAFTERS* - - - - - 376

OFFICIAL ASSIGNEE—Surplus estate - - 24
See GARNISHEE ORDER.

OPEN POLICY—Declaration - - - 18
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 [259, 265, 269, 281, 306
See VOTE FOR PARLIAMENT.

PARLIAMENT—Vote for - 241, 245, 256, 259,
 [265, 269, 281, 306
See VOTE FOR PARLIAMENT.

PAROL EVIDENCE—Custom - - - 482
See EVIDENCE TO VARY WRITTEN CONTRACT.

PARTIAL LOSS—Depreciation in value - 552
See DAMAGE BY SEA-WATER.

PARTIES TO ACTION—Amendment—Substitution - - - - 645
See SUBSTITUTION OF DEFENDANT.

PARTY WALLS—Continuing offence - 416
See CONTINUING OFFENCE.

PASTURAGE—Immemorial exercise of right
See COMMON IN GROSS. Ex. Ch. 527

PAYMENT—Composition - - - 406
See DISQUALIFICATION OF TOWN COUNCILLOR.

— Evidence—Cheque - - - 685
See EVIDENCE OF PAYMENT.

PAWNBROKER—*Pledge of Goods—Pawnbrokers Act (39 & 40 Geo. 3, c. 99), ss. 15, 16—Loss of Pawn Ticket—Right to redeem.*] The 16th section of the 39 & 40 Geo. 3, c. 99, provided that in case the pawn-ticket for goods pledged were lost, mislaid, destroyed, or fraudulently obtained from the owner thereof, and the goods remained unredeemed, the pawnbroker should, at the request of the person claiming to be the owner of the goods, deliver to such person a copy of the ticket and a form of affidavit (now a declaration) stating the circumstances, and the person having obtained such copy and form of affidavit should thereupon prove his property in such goods to the satisfaction of a justice of the peace, and should verify on oath or affirmation before the said justice the truth of the particular circumstances attending the case mentioned in the said affidavit, "whereupon" the pawnbroker should suffer the person so proving such property to the satisfaction of such justice as aforesaid, and making such affidavit or affirmation as aforesaid, on leaving the copy of the ticket and the affidavit with the pawnbroker, to redeem such goods and chattels:—*Held*, that where a person having lost the ticket for goods pledged by him

PAWNBROKER—*continued.*

had, in accordance with the section, procured from the pawnbroker a copy of the original ticket and a form of declaration, proceeded with the same before a magistrate, and having proved his title before him, straightway returned to the pawnbroker, and shewed him the declaration which he had made, he was not bound to redeem the goods immediately, but might redeem them at any time at which he might have redeemed them if he still held the original ticket, and that the pawnbroker was not justified in the meanwhile in delivering the goods to a person producing the original ticket. *BURSLEM v. ATTENBOROUGH* - - - 122

PAWNBROKERS ACT, ss. 15, 16 - - - 122
See PAWNBROKER.

PAWN TICKET—Loss of ticket - - - 122
See PAWNBROKER.

PENALTY—*Agreement for the Sale of a Public-house—Penalty or Liquidated Damages—Pleading.*] An agreement for the sale of the trade-fixture, &c., of a public-house by W. to L. at a fair valuation, contained the following stipulations,—that, in addition to the amount of the valuation, L. agreed to pay W. 50*l.* goodwill; that L. was to be allowed to take, in the event of him leaving, the said sum of 50*l.*; that L. should pay to W. 100*l.* for painting, &c.; that the rent was to be 75*l.* yearly; that six months' notice to quit should be given by either party; and that, "by way of making this agreement binding, each of the above contracting parties have deposited in the hands of H. the sum of 40*l.* each; and either party failing to complete this agreement shall forfeit to the other his deposit-money as and for liquidated damages."—In an action by L. against W. for refusing to sell pursuant to the agreement, "whereby the plaintiff had lost the advantage which would have accrued to him from the performance of the agreement by the defendant, and had lost the use of the money paid by him as such deposit as aforesaid."—*Held*, that the plaintiff's remedy for the breach was confined to the recovery of the 40*l.* deposited with H.—*Plea*, that the plaintiff sued H. for the two sums of 40*l.* deposited with him "as and for liquidated damages in respect of the said breaches, and recovered judgment in respect thereof."—*Held*, no answer to the action. *LEA v. WHITAKER* - - - - 70

— Summons—Limitation of time - - 441
See GENERAL LINE OF BUILDINGS.

PEER OF PARLIAMENT—Vote - - - 245
See VOTE FOR PARLIAMENT. 1.

PLACE OF RISK UNDER POLICY—*Insurance on Ship against Fire—Construction of Policy—Place in which Policy attaches.*] A fire policy was effected for a certain period of time, on a steamship lying in the Victoria Docks, London, with liberty to go into dry dock. The ship was taken up the river, some distance from the Victoria Docks, to the nearest available dry dock; but in order that she might be able to enter the dry dock it was necessary to remove part of her paddle-wheels. This was done in the Victoria Docks. Her repairs being completed, she was taken out of the dry dock and moored in the river at a place a few hundred yards higher up than the dry dock, where she remained ten days, for the purpose of

PLACE OF RISK UNDER POLICY—continued.

having her paddle-wheels replaced before returning to the Victoria Docks.—Whilst so moored she was destroyed by an accidental fire. It was proved to be usual to remove the paddles of large steamers to enable them to go into dry dock, and that the time occupied in the river in replacing them in this case was not unusual or unreasonable:—*Held* (affirming the decision of the Court below), that the policy only attached upon the vessel whilst in the Victoria Docks, or in the dry dock, or in the river for the purpose of going to and returning from the dry dock, and not during her stay in the river for a different purpose, and consequently the insurers were not responsible for the loss. *PEARSON v. THE COMMERCIAL UNION ASSURANCE COMPANY* - - - **Ex. Ch. 548**

PLEADING—Libel—Justification - - - **362**
See LIBEL.

— **Mortgage—Sale by mortgagee** - - - **358**
See SALE BY MORTGAGEE.

— **Written contract—Agreement to carry** **395**
See WARRANTY OF TIME OF ARRIVAL.

PLEDGE—Loss of pawn ticket - - - **122**
See PAWNBROKER.

PLENE ADMINISTRAVIT—Estoppel **Ex. Ch. 356**
See ESTOPPEL BY JUDGMENT. 1.

PRACTICE—Amendment—Parties - - - **645**
See SUBSTITUTION OF DEFENDANT.

— **Appeal from justices** - - - **416**
See CONTINUING OFFENCE.

— **Attorney—Common Pleas** - - - **103**
See SUSPENSION FROM PRACTICE.

— **Bill of exchange—Common law** - - - **100**
See LEAVE TO APPEAR.

— **Common Pleas—Attorney** - - - **103**
See SUSPENSION FROM PRACTICE.

— **Costs—Action of contract** - - - **345**
See COSTS UNDER COUNTY COURT ACTS.

— **Ejectment—Stay of proceedings** - - - **29**
See STAY OF PROCEEDINGS.

— **Motion—Office copy of affidavits** - - - **376**
See OFFICE COPY OF AFFIDAVITS.

— **New trial—Damages under 20l.** - - - **647**
See NEW TRIAL.

— **New trial—Leave reserved** - - - **470**
See LORD MAYOR'S COURT. 5.

— **Notice to proceed** - - - **29**
See STAY OF PROCEEDINGS.

— **Registration appeal** - - - **241**
See VOTE FOR PARLIAMENT. 8.

— **Striking out plea** - - - **358**
See SALE BY MORTGAGEE.

PRESCRIPTION—Toll traverse - - - **Ex. Ch. 157**
See TOLL TRAVERSE.

PRESUMPTION OF LEGAL ORIGIN **Ex. Ch. 527**
See COMMON IN GROSS.

PRINCIPAL AND AGENT—Custom of trade—Charterparty - - - **482**
See EVIDENCE TO VARY WRITTEN CONTRACT.

— **Warranty of authority** - - - **427**
See WARRANTY OF AUTHORITY.

PRINCIPAL AND SURETY—Continuing guarantee - - - **694**
See CONTINUING GUARANTEE.

PROHIBITION—Lord Mayor's Court - - - **107.**
[118, 121, 129]
See LORD MAYOR'S COURT. 1, 2, 3, 4.

PROMOTER—Disclosure of contract in prospectus
See PROSPECTUS OF COMPANY. **[328]**

PROSPECTUS OF COMPANY—Company—Prospectus—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 38—Fraud—Non-disclosure of Contracts made by Promoters or Directors.] The 38th section of the Companies Act, 1867 (30 & 31 Vict. c. 131), which provides for the disclosure in the prospectus of a company of certain particulars with regard to the class of contracts specified in the section, is applicable only for the protection of shareholders in the company, and creates no statutory duty towards bondholders of the company or others for breach of which an action on the statute will lie:—*Quære*, as to the nature of the contracts to which the provision is applicable.—*Semble*, per Honyman, J., that the section creates no statutory cause of action, but merely amounts to a declaration that, as between shareholders and those issuing the prospectus, the latter shall be deemed to have acted fraudulently. *CORNELL v. HAY. THE SAME v. MASSEY. THE SAME v. TORRENS* - **328**

PUBLIC CARRIAGE—Kicking horse - - - **390**
See EVIDENCE OF NEGLIGENCE.

PUBLIC HEALTH ACT, 1848 - - - **416**
See CONTINUING OFFENCE.

"QUANTITY AND QUALITY UNKNOWN" **679**
See DESCRIPTION OF GOODS SHIPPED. 2.

RAILWAY COMPANY—Signals at junction—Payment - - - **685**
See EVIDENCE OF PAYMENT.

— **Tort of servant** - - - **Ex. Ch. 148**
See TORTIOUS ACT OF SERVANT.

RAILWAYS CLAUSES ACT - - - **185**
See INCONSISTENT ENACTMENTS.

RAILWAYS CLAUSES ACT, 1863, s. 12 - - - **685**
See EVIDENCE OF PAYMENT.

RECEIPT—Payment—Evidence - - - **685**
See EVIDENCE OF PAYMENT.

REGISTRATION—Bill of sale - - - **64**
See SUBSTITUTED BILL OF SALE.

REGISTRATION APPEAL—Practice - - - **241**
See VOTE FOR PARLIAMENT. 8.

REGISTRATION APPEALS **241, 245, 256, 259.**
[265, 269, 281, 306]
See VOTE FOR PARLIAMENT. 1, 2, 3, 4, 5, 6, 7, 8.

RENT CHARGE—Vote for parliament **269, 281**
See VOTE FOR PARLIAMENT. 5, 6, 7. **[316]**

REPLEVIN—Damages—Estoppel - - - **454**
See ESTOPPEL BY JUDGMENT. 2.

— **New trial—Damages under 20l.** - - - **647**
See NEW TRIAL.

RESERVATION OF GAME - - - **514**
See RIGHT OF SPORTING.

RESERVATION OF MINES—*Conveyance of Land subject to Reservation of Mines and Mining Powers*—*Compensation to Grantee for Exercise of Powers reserved*—*Mode of Assessment*—*What Damage the Subject of Compensation.*] A conveyance of land in fee was made subject to a reservation to the grantors of mines and minerals, and extensive powers of occupying and using the surface for the purpose of working the same. It was provided thereby that it should not be lawful for the grantee to do or suffer anything to be done whereby the grantors should be prevented, hindered, or obstructed in the exercise of the powers reserved, and also that the grantors should make to the grantee annually reasonable compensation for damage or spoil of ground to be occasioned by the exercise of the reserved powers. Previously to the date of the deed of conveyance the premises were leased to the grantee, subject to similar reservations to those in the conveyance, and workings already existed which had taken place under such reservations:—*Held*, that no restriction was placed by the words of the conveyance on the use by the grantee of the land for any purpose to which it was applicable so long as he did not touch or interfere with the minerals, and the compensation for damage or spoil of ground occasioned by the exercise of the powers reserved must be estimated with reference to the value of the land for any purpose to which an ordinary owner might put it; and that compensation was due in respect of damage arising from the use subsequently to the conveyance of land included therein that had been previously occupied and used for mining purposes, but not in respect of the mere existence of workings in being at the time of the deed, or their subsequent user without any fresh damage. *MORDUE v. THE DEAN AND CHAPTER OF DURHAM* - 336

RESTRAINT OF PRINCES—*Marine Insurance*—*Description of Voyage*—*Overland Transit*—*Hostile Detention of Goods in a besieged Town*—*Abandonment*—*Total Loss.*] A marine policy may cover the risks during a portion of the transit to be performed overland, provided apt language be employed to express that intention.—The hostile detention of goods within a besieged city or town is a “restraint of princes;” a “siege” and a “blockade” standing upon the same footing in this respect.—In a policy of insurance the course of the voyage was thus described:—“At and from Japan and [or] Shanghai to Marseilles and [or] Leghorn and [or] London via Marseilles and [or] Southampton, and whilst remaining there for transit, with leave to call at any ports or places in or out of the way for all purposes, including all risks of craft to and from the steamers, &c., upon any kind of goods, &c., in the good ship or vessel called the — steamers or steamer, per overland, or via Suez Canal,” &c. The risks insured against were, amongst others, “of the seas, men of war, enemies, surprisals, takings at sea, arrests, restraints and detentions of all kings, princes, and people,” &c. In the margin of the policy was the following memorandum,—“It is hereby agreed that the silks insured by this policy shall be shipped by Peninsular and Oriental Company, Messageries Impériales steamers, and [or] the steamers of the Mercantile Trading Company of Liverpool only.”—The goods insured (silks) were

RESTRAINT OF PRINCES—*continued.*

carried from Shanghai to Hong Kong in a steamer belonging to the Messageries Impériales, and were there transhipped into another steamer of the same company and carried through the Suez Canal to Marseilles,—this being the ordinary course of business of that company in carrying goods from Shanghai to Marseilles. Goods are carried by the Messageries Impériales at through rates from Shanghai to London; and the freight upon the silks in question was paid to that company for the whole journey.—At the time of effecting the policy, the steamers of the Messageries Impériales ran from the East to Marseilles and no further. Goods were never, in the ordinary course of business, carried from China, Japan, or India to London via Marseilles, except by the Messageries Impériales, and that company always sent such goods overland through France,—by the Lyons railway from Marseilles to Paris, and thence by the Northern railway to Boulogne, and thence to London: and this course of business was well known among underwriters.—The silks in question, having reached Marseilles, were forwarded by the Lyons railway to Paris on the 3rd of September, 1870, and arrived at the Paris station on the 13th. At this time the German armies had invaded and occupied a large part of France, and were advancing upon Paris, which they had completely surrounded and besieged by the 19th, preventing all communication between Paris and all other places, so that it was impossible to remove the silks from Paris. This state of things continued until (and long after) the 7th of October, on which last-mentioned day the assured gave notice of abandonment. After the commencement of this action the silks were forwarded to London; and they arrived there in an undamaged state on the 20th of March, 1871.—Upon a special case setting forth the above facts, the Court to draw inferences:—*Held*, first, that the policy covered the whole journey from Shanghai to London, including the overland transit from Marseilles to Boulogne;—Secondly, that the detention of the silks in Paris by reason of the state of siege was a “restraint of princes” within the meaning of the policy; and consequently that, the goods being lost to the assured for an indefinite time, they were entitled to abandon, and to recover against the underwriters as for a total loss. *RODOCANACHI v. ELLIOTT* - - - 649

REVISING BARRISTER—Duty of—Disqualification - - - - - 245
See VOTE FOR PARLIAMENT. 1.

RIGHT OF SPORTING—*Inclosure Act*—*Game*—*Reservation of Rights of Shooting to Lord of Manor.*] An inclosure Act directed the commissioners appointed thereby to allot to the lady of the manor, her heirs and assigns, a certain proportion in value of the lands to be inclosed, in lieu of and as a full compensation for the right and interest of such lady of the manor in and to the soil of the said lands, and to allot the residue amongst the other persons entitled to rights of common; and it was enacted that the several allotments should be vested in the allottees respectively, in full bar of and satisfaction for all rights of common and other rights and interests whatsoever in, over, and upon the said lands (ex-

RIGHT OF SPORTING—*continued*.

cept such manorial rights as were thereafter reserved to the said lady of the manor, her heirs and assigns), and that all rights of common should cease over the said lands, except such manorial rights as last aforesaid. The reservation clause reserved to the lady of the manor, her heirs and assigns, all her right, title, or interest in or to the seignory or royalties incident or belonging to the manor, and all rents, quit-rents, and other rents, reliefs, duties, customs, and services, and all courts, perquisites, and profits of courts, rights of fishery, and liberty of hawking, hunting, coursing, fishing, and fowling within the said manor, and all tolls, fairs, &c., royalties, jurisdictions, franchises, matters, and things whatsoever to the said manor, or to the lord or lady thereof, incident or belonging, or which had been theretofore held and enjoyed by the lady of the manor or any of her ancestors (other than and except such common right as could or might be claimed by the said lady of the manor as owner of the soil and inheritance of the said commons or waste grounds):—*Held* (by Keating and Grove, JJ., Honyman, J., dissenting), that the Act did not reserve to the lady of the manor the right of shooting which she possessed over the lands, the subject of the Act, by virtue of ownership of the soil. *SOVERBY v. SMITH* - 514

RULE OF COURT—Attachment - - - 104
See ATTACHMENT FOR NON-PAYMENT OF MONEY.

RULES OF INSURANCE CLUB - - - 216
See CONCEALMENT OF MATERIAL FACT.

SALE, BILL OF—Bankruptcy—Waiver of tort
See WAIVER OF TORT. [350]

SALE BY MORTGAGEE—*Practice: Striking out Pleas—Mortgage: Mortgagee suing upon the Covenant after having exercised Power of Sale.*] To a declaration by mortgagee against mortgagor for the balance due for principal and interest after sale under a power in the deed of the mortgaged property the defendant pleaded, on equitable grounds, that, after default in payment of principal and interest, the plaintiff, pursuant to the covenants in the deed, entered into and took possession of the mortgaged premises, and sold the same, and so deprived the defendant of his right to have them re-conveyed to him on payment of the principal money and interest due.—A judge at chambers having struck out the plea, on the ground that it was a bad and dishonest plea, the Court refused to interfere. *RUDGE v. RICHENS* - - - 358

SALE—Contract—Penalty - - - 70
See PENALTY.

SALE OF GOODS—Measure of damage 167, 475
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SCOPE OF EMPLOYMENT - - - 563
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SET-OFF, EQUITABLE—Unliquidated damages
See EQUITABLE SET-OFF. [10]

SEVERANCE OF QUALIFICATION—Vote for parliament - - - 265
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SHIP—Bill of lading—Description of goods [88, 679]

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—Charterparty—Lay-days - - - 46
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—Charterparty—Warranty - - - 395
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—Insurance against fire—Place of risk
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—Insurance—Damage to part of goods 552
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—Insurance—Concealment - - - 216
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—Insurance—Land transit - - - 649
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—Insurance—Restraint of princes - 649
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SHIP OR SHIP'S POLICY—Declaration - 18
See INSURABLE INTEREST. 1.

SIEGE—Goods detained—Total loss - 649
See RESTRAINT OF PRINCES.

SIGNALS—Expenses—Payment - - - 695
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SOLICITOR—Agreement as to costs - 425
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STAY OF PROCEEDINGS—Ejectment—Stay of Proceedings until Payment of Costs of a former Ejectment—Notice to proceed under s. 202 of the Common Law Procedure Act, 1852.—Surprise.]
 To entitle a defendant in ejectment to apply for a stay of the proceedings until the costs of a former unsuccessful action of ejectment are paid, it is not necessary that the parties should be precisely the same, or the premises sought to be recovered identical; it is enough that the plaintiff is the same in both actions, and that the same title in substance is in issue.—To induce the Court to abstain from acting upon this rule, it must be clearly made out that the plaintiff's want of success on the former occasion was the result of perjury or fraud, or some miscarriage for which he was not responsible.—Before moving for a stay of the proceedings, the defendants had given the plaintiff the twenty days' notice to proceed, under s. 202 of the Common Law Procedure Act, 1852 :—*Held*, that this was no waiver of their right to move for a stay of the proceedings until the former costs should be paid.—But, the probable amount of the costs being large, the Court made it a condition that the time for proceeding to trial should be extended by six months. *TICHBORNE, BART., v. SIR PYERS MOSTYN, BART.* — 29

STRIKING OFF THE ROLL—Court of Common Pleas at Lancaster—Practice—Attorney.] This Court has by virtue of its general jurisdiction.

STRIKING OFF THE ROLL—*continued.*

power to strike an attorney off the roll of the Court of Common Pleas at Lancaster.—*A fortiori*, where one of its judges is pro tem. Chief Justice of that Court. *EX PARTE CHRISTOPHER BRIGGS* 63

STRIKING OUT PLEA—Practice - - - 358
*See SALE BY MORTGAGEE.***SUBSTITUTED BILL OF SALE**—*Cancellation*—

Substitution—Registration—Stat. 13 Eliz. c. 5—17 & 18 Vict. c. 36.] In June, 1871, P. assigned furniture and stock-in-trade to S. by an absolute bill of sale, as security for an advance of 20*l*. This bill of sale was not registered, but, before the expiration of the twenty-one days allowed by 17 & 18 Vict. c. 36 for registration, a second bill of sale was substituted for it; and the same operation was from time to time repeated down to the 15th of July, 1872, P. continuing all the time in possession and dealing with the goods as his own, and the 20*l*. being still a subsisting debt. The last bill of sale (which alone was stamped, and the consideration for which was stated to be a present advance of 20*l*.) was duly registered on the 1st of August, 1872 :—*Held*, that the bill of sale so registered was available against the claim of an execution-creditor of P., that there was a sufficient consideration for it, and that it was not avoided by 13 Eliz. c. 5. *SMALE v. BURR* 64

SUBSTITUTION OF DEFENDANT—*Practice—Misdescription of Defendant.*] An action having been brought against the clerk of a local board of health, the Court allowed the writ and subsequent proceedings to be amended by substituting the board as defendants instead of the clerk. *LORD BOLINGBROKE v. TOWNSEND* - - - 645

SURETY—Continuing guarantee - - - 694
*See CONTINUING GUARANTEE.***SURPLUS OF BANKRUPT'S ESTATE**—Debt 24
See GARNISHEE ORDER.

SUSPENSION FROM PRACTICE—*Attorney—Practice of the Court.*] Where a solicitor has been suspended from practice in Chancery for a given period by the Master of the Rolls, the Courts of Queen's Bench and Exchequer grant a rule to suspend him from practice in those Courts for the like period, which rule makes itself absolute if no cause is shewn, upon an affidavit of the facts and an affidavit of identification. But this Court will only grant a rule nisi, and require all the materials upon which the Master of the Rolls acted to be brought before it, and will extend the period "until the further order of the Court." *RE TURNER* - - - 103

TIME OF SHIP'S ARRIVAL—Warranty - 395
*See WARRANTY OF TIME OF ARRIVAL.***TOLL**—Toll traverse - - - *Ex. Ch.* 157
See TOLL TRAVERSE.

TOLL TRAVERSE—*Brecon Markets Act, 1862 (25 & 26 Vic. c. clxxvi.)—Toll for Goods carried by Railway.*] The Brecon Markets Act, 1862, vested in the plaintiffs certain tolls, which, under the name of "drift tolls," had been immemorially received by the corporation of Brecon for cattle, goods, and carriages passing to, through or from, the borough. A railway company, under the

TOLL TRAVERSE—*continued.*

sanction of an Act passed in the same session, acquired land, not being a highway, on which they constructed a railway and station within the borough of Brecon, whence passengers, goods, and cattle were conveyed by other lines of railway to other places beyond the limits of the borough. The rights of the corporation and of the plaintiffs were expressly reserved by the Railway Act, but there was no provision either in that or in the Markets Act expressly enabling the plaintiffs to levy tolls on the railway.—*Held*, affirming the decision of the Court below, that the plaintiffs were not entitled to toll in respect of cattle, goods, or carriages passing along the railway. *THE BRECON MARKETS COMPANY v. THE NEATH AND BRECON RAILWAY COMPANY* *Ex. Ch.* 157

TORT—Waiver—Trustee in Bankruptcy 350
See WAIVER OF TORT.

TORTIOUS ACT OF SERVANT—*Master and Servant—Railway Company, Responsibility of, for Act of Servant—Scope of Employment.*] The plaintiff, a passenger on the defendant's line of railway, sustained injuries in consequence of being violently pulled out of a railway carriage, just after the train had started, by one of the defendants' porters, who acted under an erroneous impression that the plaintiff was not in the right train for the place to which he had booked. The defendants' rules, a copy of which was given to each porter in their employ, assigned various specific duties to the porters, among others, that of not suffering passengers to get in or out of trains in motion, and concluded with a general direction that they were to do all in their power to promote the comfort of the passengers and the interests of the company. It was proved to be the duty of the porters to prevent passengers going by wrong trains, as far as they could do so, but it was not their duty to remove passengers from the wrong train or carriage :—*Held*, affirming the decision of the Court below, that there was evidence on which the jury might find that the act of the porter in pulling the plaintiff out of the carriage was an act done within the course of his employment as the defendants' servant, and one for which they were therefore responsible. *BAYLEY v. THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY* - *Ex. Ch.* 148

TOTAL LOSS—Restraint of princes - - - 649
*See RESTRAINT OF PRINCES.***TOWN COUNCILLOR**—Disqualification - 406
*See DISQUALIFICATION OF TOWN COUNCILLOR.***TRADE CUSTOM**—Written contract - 482
*See EVIDENCE TO VARY WRITTEN CONTRACT.***TRADER**—Bankruptcy—Jurisdiction *Ex. Ch.* 533
*See BANKRUPTCY JURISDICTION.***TRESPASS**—Eavesdropping - - - 162
See ALTERATION OF EASEMENT.— Replevin—Estoppel - - - 454
*See ESTOPPEL BY JUDGMENT. 2.***TROVER**—Waiver—Trustee in bankruptcy 350
See WAIVER OF TORT.

TWELVE POUND OCCUPIER—Vote for parliament - - - 256, 259
See VOTE FOR PARLIAMENT. 2, 3.

UNLIQUIDATED DAMAGES—Set off - 10
See EQUITABLE SET-OFF.

"UPON THE TRIAL OF ANY ISSUE" - 470
See LORD MAYOR'S COURT. 5.

USAGE OF TRADE—Open policy—Declaration
See INSURABLE INTEREST. 1. [18
— Written contract - - - 482
See EVIDENCE TO VARY WRITTEN CONTRACT.

USER—Highway—Dedication - - 704
See WAY, DEDICATION OF.

VOTE FOR PARLIAMENT—County and Borough
Vote—Disqualification of Voter—Peer of Parliament—Duty of Revising Barrister.] A peer of parliament is incapacitated from voting at an election for members of the House of Commons; and is therefore not entitled to be placed on the register of voters.—The revising barrister ought to strike out the name from any list on it being proved to be that of a peer of parliament, although no notice of objection has been given. *EARL BEAUCHAMP v. OVERSEERS OF MADRESFELD. MARQUIS OF SALISBURY v. OVERSEERS OF SOUTH MIMS. THE SAME v. BONTOMS. THE SAME v. BULWER* 245

2. — *County Vote—12l. Occupier—"Rateable Value"*—Representation of the People Act, 1867 (30 & 31 Vict. c. 102), subs. 2.] The "rateable value" of the premises required by s. 6, subs. 2, of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), means the real "rateable value," and not the rateable value on the rate-book; and the revising barrister may therefore go into the question, and decide what the real rateable value is. *COOKE v. BUTLER* - - - 256

3. — *County Vote—12l. Occupier—Rating—Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 6, subs. 3—Registration Acts, 6 Vict. c. 18, s. 75, and 31 & 32 Vict. c. 58, s. 30.*] The name of "N. A." had for several years appeared in the rate-book as the occupier of a house and shop wherein he carried on business. Upon his taking his two sons G. A. and T. B. A. into partnership, the overseers at his request altered the rating to "N. A. & Sons," the name under which the business was thenceforth to be carried on. N. A. had retired from the concern some years, but G. A. and T. B. A. still occupied the premises and carried on the business under the style of "N. A. & Sons," and were called upon to pay and paid the rates; on the rate-book the name of "N. A. & Sons" still appeared as "occupiers":—*Held*, that G. A. and T. B. A. were rated within 30 & 31 Vict. c. 102, s. 6, subs. 3, the insufficiency or inaccuracy of description, if any, being cured by s. 75 of 6 Vict. c. 18, and s. 30 of 31 & 32 Vict. c. 58; and they were therefore entitled to a vote for the county as 12l. occupiers. *LITTLE v. OVERSEERS OF PENRITH* - - - 259

4. — *County Vote—Severance of Qualification under 2 Wm. 4, c. 45, s. 24—Freehold Land and Pew Rents.*] The respondent was placed on the register of voters for a county in respect of "Freehold Land and Pew Rents, St. Mary's

VOTE FOR PARLIAMENT—continued.

Church," which was situate in a borough. He was minister of that church, and as such occupied the parsonage house, and was entitled, in respect of the house, to a vote for the borough. His stipend as minister was "the residue of pew-rents" after certain payments made thereout by the churchwardens:—*Held*,—upon a case which reserved only the question whether the pew-rents could, notwithstanding 2 Wm. 4, c. 45, s. 24, be severed from the occupation of the house (which was part of the benefice), so as to give a separate qualification for the county,—that there was nothing in that section to prevent them from being so severed, and consequently that the respondent was entitled to have his name retained upon the county register. *BESWICK v. ALKER* 265.

5. — *County Vote—Inmate of a Charitable Foundation—Equitable Estate—Rent-charge—Free Land or Tenement—8 Hen. 6, c. 7.*] By a charter of incorporation and an Act of Parliament, the inmates of the "Hospital of King James at Gateshead" were to consist of a master, three "antient brethren," and (by additions from time to time made) twenty-three "younger brethren," the latter forming no part of the corporation. The brethren, whose appointments were for life, were subject to certain rules, and were removable (though none had ever been removed) for certain misconduct.—The estates of the hospital, which were originally granted to "the master and brethren and their successors in free, pure, and perpetual frankalmoin for ever," were under the management of the master, who, after payment of land and income-tax, tithes, repairs, and other outgoings, was to appropriate to his own use one-third of the net proceeds, and pay 25l. a year to each of the three antient brethren, and 40l. (afterwards increased to 70l.) a year to the chaplain, and to reserve in his hands a balance not exceeding 60l. to meet current expenses, and to divide the residue among the younger brethren in equal shares, yet so nevertheless that no younger brother should take under such division more than 25l. The number of younger brethren had never been increased so as to reduce their respective shares below 24l. per annum. None of the brethren actually occupied any part of the hospital property:—*Held*, that the "younger brethren" had neither a legal nor equitable estate in the lands and tenements belonging to the hospital; nor a rent-charge thereon; and were therefore not entitled to a county vote. *SIMEY v. MARSHALL* - - - 269

6. — *County Vote—Rent-charge—"Actual Possession," under 2 Wm. 4, c. 45, s. 26—Statute of Uses, 27 Hen. 8, c. 10.*] On the 13th of October, 1871, A., being seised in fee of certain lands, by indenture granted out of them "unto B., C., and D., and their heirs, one perpetual yearly rent-charge of 9l., to be payable by equal half-yearly payments on the 5th of April and 5th of October in each year," the first payment to be on the 5th of April, 1872, "To hold the said rent-charge unto the said B., C., and D., their heirs and assigns, to the use of the said B., C., and D., their heirs and assigns for ever, as tenants in common, and in equal shares." The first half-yearly payment was duly made on the 5th of April, 1872:—

VOTE FOR PARLIAMENT—continued.

Held, first, that, the use being specific and not inconsistent with the rest of the habendum, the whole habendum must be read as specific, and so read, the deed operated as a grant at common law, and not under the Statute of Uses; and therefore, secondly, upon the authority of *Murray v. Thornhiley* (2 C. B. 217) and *Hayden v. Twerton* (4 C. B. 1), that the grantees had not been in the "actual possession" of the rent-charge for six calendar months previous to the last day of July, 1872, as required by the 2 Wm. 4, c. 45, s. 26, and were not entitled to be registered in that year as county voters.—*Heelis v. Blain* (18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88) distinguished. **WEBSTER v. OVERSEERS OF ASHTON-UNDER-LYNE. ORME'S CASE** - - - - - **281**

7. — *County Vote—Rent-charge—"Actual Possession" under 2 Wm. 4, c. 45, s. 26—Statute of Uses, 27 Hen. 8, c. 10—Power of Court to review its own Decisions—6 Vict. c. 18, s. 66, Construction of.* By a deed executed on the 29th of January, 1872, which operated under the Statute of Uses, an annual rent-charge of 35*l.* 14*s.* was granted to the use of seventeen persons in fee as tenants in common, to be payable by equal half-yearly payments on the 29th of January and the 29th of July. The first payment, payable on the 29th of July, 1872, was paid on the 30th of July:—*Held*, that, as the grant operated under the Statute of Uses, the case came within the decision in *Heelis v. Blain* (18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88), and that on the authority of that case the grantees, by force of the Statute of Uses, had been in "actual possession" of the rent-charge from the date of the grant, within s. 26 of 2 Wm. 4, c. 45, and were therefore entitled to be upon the register of voters for the year 1872.—*Seemle*, that the Court, though a Court of ultimate appeal in registration cases, will review its previous decisions, and overrule them if clearly demonstrated to be erroneous.—*Seemle*, that s. 66, of 6 Vict. c. 18, makes the decision of the Court final and conclusive only in the case in which it is given. **WEBSTER v. OVERSEERS OF ASHTON-UNDER-LYNE. HADFIELD'S CASE** - - - - - **306**

8. — *Registration Appeal—Notice of Intention to prosecute—Reasonable Time for giving Notice—Registration Act, 1843 (6 Vict. c. 18, s. 64.)* A revising barrister signed the case and appointed the respondent in a consolidated appeal on the 31st of October, and the 13th of November was the first day appointed by the Court for the hearing of registration appeals. The appellant did not give notice to the respondent of his intention to prosecute the appeal until the 4th of November. The respondent did not appear:—*Held*, that the Court could not, under the proviso to the 64th section of the Registration Act, 1843, take into consideration any circumstances to excuse the not giving of the ten days notice required by the section, except the absence of reasonable time for giving such notice; and that there was reasonable time in the present case for giving such notice, and, consequently, that the appeal could not proceed. **BROWN v. TAMPLIN** - - - - - **241**

VOTING-PAPER—Presiding officer—Action 489
See BREACH OF MINISTERIAL DUTY.

WAIVER OF TORT—Trover—Bill of Sale void as against Trustee of Bankrupt's Estate—Sale of Goods under—Proceedings under Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 72, by Trustee to recover Proceeds of Sale.] The trustee of a bankrupt's estate applied, under the 72nd section of the Bankruptcy Act, 1869, to the Court of Bankruptcy to declare a bill of sale, made by the bankrupt previously to his bankruptcy, fraudulent and void as against himself as trustee, and to order the assignee under the bill of sale who had previously to the bankruptcy sold the goods comprised therein, to pay over the proceeds of the sale to himself as such trustee. The Court of Bankruptcy having made the order prayed for, and the assignee having accordingly paid over the proceeds of the sale:—*Held*, that the trustee could not afterwards bring an action of trover against the assignee under the bill of sale to recover the difference between the value of the goods and the amount realized by the sale, inasmuch as by the proceedings in bankruptcy to recover the proceeds of the sale he had affirmed such sale and waived the tort. **SMITH v. BAKER** - - - - - **350**

WARRANT—Committal—County Court - **378**
See COMMITTAL UNDER DEBTOR'S ACT, 1869.

WARRANTY—Insurance - - - - - **216**
See CONCEALMENT OF MATERIAL FACT.

WARRANTY OF AUTHORITY—Agent—Company—Director—Misrepresentation of Fact.] The directors of a railway company which had fully exercised the borrowing powers conferred upon it by its special Act, in August, 1864, advertised that they were "prepared to receive proposals for loans on mortgage-debentures," "to replace loans falling due." W. W. (the plaintiff's testator) offered a loan of 500*l.*; and, his offer being accepted, he in the same month sent his cheque for 500*l.* to the directors, for which he requested that a debenture should be issued to him. In pursuance of a resolution of the directors to that effect, the cheque was handed to H., the contractor for the works, who had been (but had then ceased to be) the holder of seven debenture-bonds for 500*l.* each; and H. was requested to transfer one of them to W. W.; and it was by the same resolution directed "that such bond be on the 1st of October exchanged for a new one." H. kept the cheque (which was duly honoured), but was unable to transfer the debenture; and in pursuance of a resolution of the directors of the 5th of October, a new debenture-bond for 500*l.* was sealed and sent to the plaintiff, as executor of W. W. The defendant, a director of the company, was a party to each of the above transactions. By a decree of the Court of Chancery of the 14th of February, 1868, the above-mentioned debenture was declared void, as being for a sum in excess of the borrowing powers of the company.—Upon a case stated for the opinion of the Court, without pleadings, and upon the argument of which it was agreed that no question of non-joinder was to be raised:—*Held*, that the defendant was liable as for a breach of warranty that the directors had power under the circumstances to issue a debenture which should be valid and binding upon the company; and that the plaintiff was entitled to

WARRANTY OF AUTHORITY—continued.

recover as against him the 500*l.*, together with interest by way of damages. **WILLIAM WEEKS v. PROPERTY** - - - - - 427

WARRANTY OF TIME OF ARRIVAL—Shipping

—*Construction of Charterparty—Warranty as to Time of Ship's Arrival at the Port of Loading—Pleading—Contemporaneous Agreement.*] By a charterparty it was agreed that the ship *Ceres*, of the measurement, &c., "expected to be at Alexandria about 15th of December," being tight, &c., should "with all convenient speed" sail and proceed to that port, and there receive from the charterers a cargo of cotton-seed.—In an action against the owner, the breach alleged in the declaration was, that the said ship was not expected to be at Alexandria about the 15th of December, 1871, but was then in such part of the world and under such engagements that she could not perform those engagements and arrive at Alexandria about the said day:—*Held*, a good plea,—the descriptive statement amounting to a warranty that the ship was in such a position that she might reasonably be expected to arrive at Alexandria by the day named.—Plea, that, at the time of making the charterparty, the ship was, to the plaintiff's knowledge, engaged for a certain voyage, and that the charterparty was made subject to a condition that the ship should with all convenient speed fulfil her engagement, and then proceed to the port of loading, and that she did so:—*Held*,—upon the authority of *Young v. Austen* (Law Rep. 4 C. P. 553),—a good plea. **CORKLING v. MASSEY** - - - 395

WAY, DEDICATION OF—Public Highway, Creation of—User by the Public—Inclosure Act—Award setting out Public Roads.] An Act passed in 1802 for inclosing a portion of Eppingham Common. In 1808, the commissioner appointed to carry the Act into execution made an award whereby and by the map deposited therewith a public road 40 feet wide was directed to be made from A. to B. This road was accordingly set out, and was duly fenced by the allottees of the land adjoining it; but it was never formed and completed so as to satisfy the requirements of ss. 8 and 9 of the General Inclosure Act, 41 Geo. 3, c. 109, and to become a highway repairable by the parish; and there was no evidence that it had ever been used except by the owners or tenants of the allotments on the side of it, and in two or three instances by other persons shortly after it was so set out. About the year 1822, S., who was the lord of the manor of Eppingham East Court, and who had purchased some allotments abutting on a portion of the road, planted along the whole length of it, about 9 or 10 feet from the fence separating it from Ranmore Common, a row of fir-trees, and the rest of the 40 feet was overgrown with briars, brambles, and furze. The plaintiff in 1852 became the owner of an estate abutting on the other portion of the road, and had for more than twenty years exercised repeated acts of ownership over the whole of the 40-foot space, such as, shooting over it, cutting down some of the fir-trees when they wanted thinning, and repairing the fences; though these it appeared had occasionally been repaired by other persons, to prevent sheep and cattle from straying on to their lands from the adjoining common. The defend-

WAY, DEDICATION OF—continued.

ant, in 1869, purchased the estate which had formerly belonged to S.; and in 1870 she cut down and converted several of the trees growing upon the 40-foot space opposite the plaintiff's land; and to an action against her for this alleged trespass she pleaded (amongst other pleas) that the locus in quo was a common and public highway for all the Queen's subjects, and justified the cutting down and removing the trees in the exercise of such right of way.—Neither in the conveyance to the plaintiff, nor in that to the defendant, nor in the respective plans thereto annexed, was any mention made of the 40-foot road.—The jury found that the defendant did the acts complained of in the assertion of a claim of property, and not of a right of way; that the 40-foot road was never taken to as a public highway by the public; and that the plaintiff had had twenty years' uninterrupted possession of the locus in quo:—*Held*, that the evidence did not support the plea. **CUBITT v. LADY CAROLINE MAXSE** - 704

WEST HAM LOCAL BOARD OF HEALTH ACT, 1867—30 & 31 Vict. c. lvi. s. 15—Open Ditches at Roadside.—By s. 15 of a local Act, the local board were directed to cause offensive ditches to be cleansed, covered, or filled up; and s. 16 empowered them to "cause the ditches at the sides of or across the public roads and byeways and public footways to be filled up, and to substitute pipes or other drains alongside or across such roads," &c.; and enacted that "the surface of land gained by filling up such ditches might, if the local board so thought fit and directed, be thrown into such roads and ways and be repairable as part thereof, and be under the control of the local board."—Adjoining a highway within the district was a strip of land 9 feet in width next to the plaintiff's inclosed land, and separated from the highway by a line of posts and rails. This strip of land comprised 1 foot of greensward on the outer edge (in which the posts were fixed), a five-foot ditch, and 3 feet of greensward next to the plaintiff's inclosed land. A similar strip extended along the front of the adjoining property, with similar posts and rails, but no ditch. The posts and rails were put up about forty years ago, and had been usually repaired by the plaintiff and the former owners of his property, but on two or three occasions the surveyor of the highways and the local board had repaired them, without, however, the plaintiff's knowledge. The board removed the posts and rails and covered the ditch.—Upon a special case, reserving power to the Court to draw such inferences as a jury might have drawn:—*Held*, that s. 16 of the local Act did not justify the board in doing as they did. **TUTILL v. THE WEST HAM LOCAL BOARD OF HEALTH** - - - 447

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